No. 348

In the Supreme Court of the United States

OCTOBER TERM, 1957

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC. (I. G. CHEMIE), PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND IVY BAKER PRIEST, TREASURER OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The principal opinions of the courts below are that of the district court of February 19, 1953 (R.[1] 605–

[1] Respondents will follow petitioner in citing as "R" the consecutive numbers of the pages of the printed record in this Court and in not citing the folio numbers in use at earlier stages of the case. "MS. R." will be used to refer to the manuscript, unprinted record.

Volumes 1–4 of the record (R. 1–1918) consist of the printed joint appendix in the court of appeals in 1955, in No. 12140.

28), reported at 111 F. Supp. 435, and of November 16, 1953 (R. 672–3), reported at 13 F. R. D. 83 (R. 672–3), and that of the court of appeals of June 30, 1955 (R. 2028–46), reported at 225 F. 2d 532, following which this Court denied a petition for a writ of certiorari (350 U. S. 937). Thereafter, the district court on July 23, 1956, delivered an unreported opinion from the bench (R. 1998–2000) and the court of appeals wrote an opinion on April 11, 1957 (R. 2058–61), reported at 243 F. 2d 254. See, also, *Kaufman* v. *Brownell*, 247 F. 2d 553 (C. A. D. C.), certiorari denied, 355 U. S. 842, a proceeding by minority stockholders of petitioner to recover their interest.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1957 (R. 2061–2). A petition for rehearing *en banc* was denied on May 10, 1957 (R. 2069). The petition for a writ of certiorari was filed on August 6 and was granted on October 14, 1957 (355 U. S. 812; R. 2090). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

In a suit by petitioner, a Swiss holding company, for the return of property vested as that of an enemy, the district court, in 1949, ordered petitioner to produce, for the inspection of the respondents, the rec-

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Volume 5 (R. 1922–2027) is the printed joint appendix in that court in 1957, in Nos. 13460 and 13527. Volume 6 (R. 2028–91) contains papers printed in this Court on the petitions for certiorari, including the opinions of the court of appeals, and additional pages from the record, not hitherto printed.

ords of Sturzenegger & Cie., petitioner's house bank, which the court found to be relevant and within petitioner's control. The records were not produced, on the ground that an order directly prohibiting such production had been made by the Swiss Federal Attorney, based upon Swiss secrecy laws. The district court reaffirmed its findings that petitioner and Sturzenegger were substantially identical, and ruled that but for the Swiss official's action the records would be produced; that the case and the nature of the records are such that nonproduction might give petitioner a decisive advantage; that petitioner had refused to produce the records and that it could not be excused by reason of the Swiss official's action; and that unless full production were made, the complaint would be dismissed for noncompliance with essential court procedures. After proceedings extending over seven years, only partial production was made, despite extensions granted by both the district court and the court of appeals. Finally the district court dismissed the complaint, and the court of appeals affirmed.

The questions presented are:

1. Whether the record supports the findings that petitioner and the Sturzenegger firm were substantially identical and the firm's records therefore under the control of petitioner, so that but for the Swiss Federal Attorney's order the records would have been produced.

2. Whether the record supports the findings that the Sturzenegger records are of decisive importance

in the determination of the issues raised by petitioner's suit under the Trading with the Enemy Act.

3. Whether, in the circumstances presented, the dismissal because of nonproduction of the records was warranted, despite the proffered excuse of the order of the Swiss official forbidding production.

4. Whether the district court had the power to dismiss the complaint.

STATUTE AND RULES INVOLVED

The pertinent portions of the Trading with the Enemy Act and of the Federal Rules of Civil Procedure are set out in Appendix, *infra*, pp. 86–94.

STATEMENT

Early proceedings.—In October 1948, petitioner, a Swiss holding company known as I. G. Chemie or Interhandel, brought suit against the Attorney General, as successor to the Alien Property Custodian (herein called "the Custodian"),[2] in the United States District Court for the District of Columbia, for the return of some 93% of the stock of General Aniline & Film Corporation, a Delaware corporation, and about $1,800,000 in cash. The property had been vested under the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*), by Vesting Orders containing formal findings that the property belonged to I. G. Farbenindustrie, A. G., of Germany, an enemy national (*e. g.* V. O. No. 907, Feb. 15, 1943,

[2] The Attorney General succeeded to the powers and duties of the Alien Property Custodian by Executive Order No. 9788, Oct. 14, 1946 (11 Fed. Reg. 11981). The Treasurer of the United States is a nominal defendant.

8 Fed. Reg. 2453; R. 380–4). The complaint alleges that petitioner is the owner of this property and that it is not an enemy (R. 148–62). The answer denies both allegations and, as a separate defense, alleges that from the time of petitioner's incorporation in 1928 to the surrender of Germany in 1945 petitioner had participated in a conspiracy or common plan with the private Swiss banking house of H. Sturzenegger & Cie. (prior to 1940 known as Ed. Greutert & Cie.), with I. G. Farbenindustrie and with others to cloak the ownership, control and domination by I. G. Farben of properties in the United States and in many other countries (R. 358–95).

The Greutert-Sturzenegger firm, known to have been the founder of petitioner on behalf of I. G. Farben (R. 211–3), assumed prominence in the case even before the complaint was filed. Before suit was begun, the Custodian perpetuated the testimony of two aged witnesses, once the co-owners of the Greutert firm with Farben, on the beginnings of the firm and its relations with Farben and with Farben's chairman and financial leader, Hermann Schmitz, in the nineteen twenties and until the early thirties (R. 1826–88). One of these witnesses, Rudolf Euler, testified, *inter alia*, that after the Schmitz group bought an interest in the Greutert firm in 1926, the firm was a "tube" into which Farben money went, coming out on the other side "to some other firm connected with I. G." (R. 1878–9).

Immediately on the filing of the complaint, the Custodian sought, by notice served on petitioner, to take the deposition of Mr. Hans Sturzenegger on the

grounds that he was, under petitioner's bylaws, a member of its "business conducting body"; that he represented petitioner in and out of court; and that, by reason of the many ties between the Sturzenegger firm and petitioner, the former was the controlling influence in, and *alter ego* of, petitioner (R. 164–80, 22–6). The district court, *per* Chief Judge Laws, held that Mr. Sturzenegger was an officer or managing agent of petitioner and that petitioner was required to bring him from Switzerland (R. 193–5).

The first of the Swiss Government's actions affecting the case occurred in connection with the place where Mr. Hans Sturzenegger's deposition was to be taken. The Custodian set the deposition for Washington and petitioner moved that it take place in Switzerland (R. 163–4). To show that the deposition could not be held in Switzerland, the Custodian, with the consent of the United States Department of State, filed diplomatic notes received from the Swiss Government, showing that the latter has consistently refused to allow American depositions to be taken in Switzerland, in enemy property and other cases, on the ground that "the taking of testimony, according to the Swiss conception, is a judicial prerogative of Federal and Cantonal sovereignty to which no exceptions can be made" (R. 181–4, 172–3). When this was shown, counsel for petitioner, in his words, "got busy," and in less than two weeks persuaded the Swiss Government to inform this Government that it was "willing, as an exception, that for this case depositions be taken in Switzerland and documents examined there, in accordance with the American law" (R. 21, 172–3, 188–9).

The Department of State commented that this invitation indicated a change of position by the Swiss Government from one of sovereignty to one of discretion and requested that the invitation be declined in the absence of a permanent procedure which would avoid "discriminatory" action "on the basis of an interest in the outcome of litigation" (R. 187–8). The district court denied the petitioner's motion that Mr. Sturzenegger's deposition be taken in Switzerland (R. 195).

The order for discovery, July 5, 1949.—Before the taking of the deposition of Mr. Sturzenegger began in February of 1949, both parties moved under Rule 34 for the production of documents in the possession, custody and control of the other (R. 196–204). The major issue arose on the Custodian's demand for the production by petitioner of the records of the Sturzenegger firm, made on the ground that petitioner and the Sturzenegger firm were substantially identical. Petitioner contended that the Sturzenegger records were not in its possession, custody or control (R. 326–327c, 29–33, 35–42). The Custodian relied upon the ties of cross-ownership between petitioner and Sturzenegger and upon their intimate physical, personal and business relationships, documented by Mr. Hans Sturzenegger's admissions (R. 329–30) and by three reports of the Swiss Compensation Office (R. 198–204, 205–34, 234–61, 262–324).

These reports were the products of two post-World War II investigations by the Swiss Compensation Office, an agency of the Swiss Government charged with the blocking of German assets in Switzerland (R. 612, 436–7). The Swiss agency concluded that petitioner

was not German under Swiss law, and counsel for petitioner had offered to stipulate the reports, referring to them as petitioner's "clean bill of health" (R. 26–7).[3] The Custodian contended that the facts disclosed in these reports showed the essential identity of petitioner with the Sturzenegger firm and the intimacy of both with I. G. Farben (R. 169–72, 198–204).

The cross-motions for discovery pended for over five months and were considered on extensive written materials and oral hearings (R. 197–324, 27–42). They were heard by Chief Judge Laws, who thereafter presided over the proceedings (extending over seven years) with respect to discovery of the Sturzenegger records.

The district court granted both motions, and on July 5, 1949, made an order for the production, discovery and inspection by both parties of the records of the other, including, in the case of production by petitioner, the papers and books of the Sturzenegger firm (R. 339–42). In its opinion, the court found that the Custodian had made out a *prima facie* case of

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[3] Petitioner in its brief (pp. 7, 8, 38) argues that these reports were a ruling that petitioner was not an enemy or enemy-controlled and that the United States did not appeal the ruling, under the Swiss-Allied Accord of May 25, 1946. The Department of State has repeatedly pointed out that the Swiss agency acted under domestic Swiss decrees and not under the Accord and that, in any event, the Accord, an executive agreement, did not affect assets vested under the Trading with the Enemy Act or the jurisdiction of the courts under that Act to determine whether petitioner and the property it seeks are enemy-tainted under the Act (R. 559–72; see 36 Dept. of State Bull. 350–5 (1957)).

control by petitioner over the Sturzenegger records, and that, in such a case as this, all the records of the plaintiff, its subsidiaries and affiliates were subject to inspection (R. 335–8). The documents ordered to be produced were designated as the "700 jackets and 140 account books" on the premises of petitioner and Sturzenegger examined by the Swiss Compensation Office, which had examined all the rooms and records of both petitioner and Sturzenegger, though the issue before that Office had been the German character of petitioner alone (R. 612–3, 616, 230–5, 773–5, 793, 796, 804–13).[4]

The order provided that the sequence of proceedings should be, first, inspection by petitioner of the Custodian's documents; next, the resumption and completion of the deposition of Hans Sturzenegger; and last, inspection by the Custodian of the documents which petitioner was required to produce (R. 339–40).

In the fall of 1949, in compliance with the order, the Government produced and the petitioner copied all (approximately 20,000) documents ordered to be produced by the Custodian (R. 607).

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[4] The order required petitioner to produce (R. 340–1):

(a) The some 700 jackets and 140 account books on the premises of I. G. Chemie and H. Sturzenegger & Cie., examined in the course of the investigation of the German character of I. G. Chemie by investigators of the Swiss Compensation Office in 1945 and 1946.

(b) The lists of the some 2,500 original documents taken by investigators of the Swiss Compensation Office in 1945 and 1946 from the premises of I. G. Chemie and H. Sturzenegger & Cie. for submission to said office.

Of the 700 jackets and 140 account books, 450 jackets and 110 books were those of the Sturzenegger firm (R. 234–5, 806).

Mr. Hans Sturzenegger's deposition, the next scheduled proceeding, had been recessed during the hearings on the motions for discovery, following Mr. Sturzenegger's refusal to answer questions about wartime dealings between his firm and I. G. Farben (R. 944–50). On motion, the district court, *per* Judge Bailey, rejected petitioner's contention that Mr. Sturzenegger was required to testify only as to matters respecting petitioner and ordered that he answer the questions (R. 342–5). On the resumption of the deposition, however, Mr. Sturzenegger again refused to answer the questions, this time on the ground of the Swiss secrecy laws (R. 56–62, 953–7), although he had early in his deposition waived those laws as to some 75 named persons, including I. G. Farben (R. 821–61). The court thereupon overruled this claim, holding that "foreign law or foreign privilege is not a valid excuse for a refusal to answer the questions" (R. 356). Rejecting the argument that Mr. Sturzenegger was being required to violate the Swiss secrecy laws, Judge Bailey said, "I do not think this Court will permit a foreign law to obstruct it in ascertaining the facts in a case at issue before it" (R. 62).

In the course of the resumed deposition, Mr. Sturzenegger stated that he did not intend to allow the inspection of the Sturzenegger records pursuant to the order for discovery (R. 951–2). The Custodian thereupon moved that the production take place in the United States, rather than in Switzerland as originally ordered (R. 357), and petitioner cross-moved to amend the discovery order by eliminating

the Sturzenegger records from those ordered produced, contending that their disclosure would violate the Swiss penal laws concerning bank secrecy and economic espionage, *i. e.*, the Swiss secrecy laws (R. 395–6, 405–12). On the motion, Mr. Sturzenegger again affirmed that he felt "obliged to decline to permit the plaintiff to exhibit the firm's records", on the ground, *inter alia*, of the "banking and penal secrecy laws of Switzerland" (R. 395–9, 2077).

Because petitioner sought a delay in the disposition of the motion on the ground that the conflict between the Swiss secrecy laws and the court's order to produce had created an international diplomatic situation, the Custodian solicited the views of the Department of State (R. 399b, 403–5). The Department of State replied that it "does not consider the matter is of diplomatic interest to it," and that it believed that in a suit brought in the United States the plaintiff is subject to "the normal rules of proof and production of records obtaining in the United States courts" (R. 402). On April 21, 1950, Chief Judge Laws denied both motions, stating that he would stand on his previous order to produce (R. 412-3, 75).

Mr. Sturzenegger's deposition was concluded on May 31, 1950 (R. 1561). The inspection of petitioner's documents was set by the order for thirty days thereafter (R. 341), and Government counsel made preparations for the trip to Switzerland.

On June 15, 1950, two weeks before the time set for inspection, the Swiss Federal Attorney, an officer in the Swiss Ministry of Justice and Police, issued an

order forbidding H. Sturzenegger & Cie. to produce its records. Without directing that they be taken into possession, the order recited that "all" the Sturzenegger records and books "ordered to be produced by the American judge" were "herewith confiscated". The stated purpose of the order was to prevent production of the records as ordered by the American district court because inspection would violate Swiss laws relating to bank secrecy and economic espionage (R. 435–6, 608, 2030, 2037). Petitioner thereupon moved again, on June 22, 1950, to be excused from the obligation to produce the Sturzenegger records (R. 415), and the Government renewed its motion that the records be ordered produced in the United States (R. 413–4). After hearing, Chief Judge Laws denied both motions without prejudice, stating that the order for discovery would stand and that the inspection should proceed (R. 77–9).

The failure to produce and the motion to dismiss.—On the inspection in Switzerland in July 1950, petitioner failed to produce any of the Sturzenegger papers, on the ground of the order of the Swiss Federal Attorney, but it did purport to produce its own books of account and papers (R. 418). Petitioner's records and the Sturzenegger records were thereafter the subjects of separate proceedings.

With respect to the production of petitioner's own books and papers, the Custodian showed that the petitioner had suppressed some 9,000 of its papers and that the books of account which were produced were a rewritten set. Several of the account books had been purchased from a stationer after the time as of

which they purported to record petitioner's daily transactions.[5] Proceedings with respect to the books were not concluded, by reason of the intervening dismissal of the complaint for nonproduction of the Sturzenegger papers, but, on motion by the Government, petitioner did produce some 5,000 of the suppressed papers, which it then "found" in its files (R. 108–9, 550–3, 572–97, 603–4).

With respect to the Sturzenegger records, the Government renewed its motion for dismissal of the complaint because of their total nonproduction, and petitioner renewed its motion to be relieved of the obligation to produce these records (R. 417, 435).

Two days before the hearing on these motions, the Swiss Government addressed to the district court, through the Department of State, a note in explanation of the charges of inconsistency against it and of the Swiss laws under which it had acted (R. 446–52). The Department forwarded the note "for such value as the court may ascribe to the note", with the comment that the transmission was made as a matter of courtesy and "shall not be interpreted as constituting an espousal by the Department of any of the statements in the note" (R. 446–7). The court referred to a Master the questions of the nature of the Swiss law and of petitioner's good faith in seeking to comply with the discovery order (R. 452–9).

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[5] The Department of State has called to the attention of the Swiss Government a newspaper report that petitioner has admitted that the books which it produced were not those ordered to be produced (36 Dept. of State Bull. 350–1 (1957)).

The Master found and reported that petitioner and Sturzenegger had acted in good faith, without collusion with the Swiss Government (R. 536–43, 522, 531),[6] and the matter returned to the district court on the Government's objections to the Master's report and renewal of its motion to dismiss (R. 553).

The decision of the district court to dismiss, February, 1953:—In November 1952, in a hearing extending over five days, the district court reviewed the failure to produce the Sturzenegger records. Although it adopted the Master's conclusion of petitioner's good faith,[7] it held, in a comprehensive opinion dated February 19, 1953, that the significance of the records was such that unless the petitioner complied fully with the order for production within a

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[6] That neither petitioner nor Sturzenegger & Cie. had sought waivers from the persons whose secrets were contained in the records was deemed not an indication of bad faith, for the reason that the necessary waivers were multiple and therefore impracticable (R. 505–8, 537–42). The Master also found that petitioner had no right of appeal from the Swiss order and that while H. Sturzenegger & Cie. did have a right to appeal, its decision not to do so was made in good faith (R. 528). Appeals were nevertheless filed by both, by petitioner pending the proceedings before the Master, and were unsuccessful in obtaining the release of the papers. The appeals resulted in an offer by the Swiss authorities, in June 1951, to release documents proved indispensable to the suit, provided that waivers of their secrets were obtained from the interested persons. This offer was further subject to the Swiss Government's reservation of a discretionary right to refuse to release particular documents (R. 753–5, 646–59).

[7] The court noted that "it may be true plaintiff [petitioner] did not exercise the utmost diligence and persistence in seeking to rescind" the Swiss Government's order (R. 610–1).

specified time, June 15, 1953, the complaint would be dismissed with prejudice (R. 84–108, 605–28, 632–4).

In its opinion, the court reexamined its *prima facie* ruling that petitioner had control of the Sturzenegger papers, made separate findings on the indicia of control, and concluded that "[t]hrough the interlocked web of corporate organization, management and finance, there runs the thread of a fundamental identity of individuals in the pattern of control. On further consideration, the Court now definitely concludes that the Sturzenegger papers were and are in the possession, custody or control of plaintiff and that except for their confiscation by the Swiss Federal Attorney, plaintiff would be able to produce them" (R. 615).

The court referred to the Government's showing as to the contents of the Sturzenegger papers and held that those papers, being concededly relevant and, as petitioner's banking records, among the "best possible indicia" of its ownership and control, "well might prove to be a deciding factor in the outcome of this suit". The "pressing importance" of the papers was confirmed by the fact that the Swiss Government, in investigating the German ownership of petitioner, made full examination of all the documents of both petitioner and Sturzenegger, with the "plain" inference that "an investigation of I. G. Chemie is necessarily an investigation of H. Sturzenegger & Cie." (R. 615–7, 613).

The court then turned to the question of the action appropriate where "a foreign government prohibits its national, a party plaintiff, from performing its duty to make discovery as ordered pursuant to Rules

of the Court" (R. 618). The Swiss secrecy laws, the court noted, give an immunity to bank records which is not recognized in the law of the forum; communications between banks and customers are not privileged in this country, and a threat of incrimination by foreign law is not a valid basis for refusal to give one's testimony. Foreign law, it held, could not be permitted to frustrate the procedures for investigation of the facts established as conducive to the proper administration of justice. The court concluded that if the Sturzenegger papers were not produced, the complaint should be dismissed. It noted that the question before it, while novel in the United States, had been frequently decided in favor of dismissal of the complaint in comparable cases in England (R. 619–23).

On a finding that "plaintiff with the Sturzenegger papers in his actual possession has 'refused' or 'declined' to exhibit them as ordered", the court held that Federal Rule 37 (b) (2) (iii) (Appendix, *infra*, p. 92) authorized the dismissal (R. 623), and, that, apart from specific statute, there was inherent power to dismiss the complaint because of the petitioner's failure to comply with essential procedures for the administration of justice (R. 625).

The court postponed the effective date of the dismissal for three months, to expire June 15, 1953, so as to give petitioner further opportunity to produce as ordered, because it was only "now * * * made clear that full production of the papers is essential to permitting a trial of this case and cannot be excused because of prohibitions of plaintiff's govern-

ment * * *. If * * * it develops full disclosures are not permitted, this suit will be dismissed with prejudice so far as plaintiff is concerned" (R. 626–7). An order was made accordingly, on March 31, 1953 (R. 632–4).

Proceedings following the district court's decision to dismiss.—Petitioner and the Sturzenegger firm proceeded to appeal to the Swiss Federal Council for permission to produce the records and also to solicit waivers from the persons whose secrets were contained in the records (R. 635–9, 652–5, 657–60). This solicitation was pursuant to the offer of the Swiss Federal Attorney, made two years earlier in 1951, "to release individual documents proved to be indispensable for the suit", on condition that waivers were obtained and with the reservation of "the right to refuse to release individual documents without stating grounds for this" (R. 626).

Petitioner's time to comply was once extended and thereafter petitioner sought an indefinite extension of time to comply (R. 655–7, 633–4). When the matter came on for hearing on October 20, 1953, it appeared that permission to comply fully with the order for production had been formally refused by the Swiss Federal Council, the highest authority in Switzerland (R. 112, 658, 660–3). Requests for waivers had been addressed to 124 persons,[8] and had resulted in 91 waivers. Two had refused to waive, several had re-

[8] These names had been listed by Government counsel, two years previously, as illustrations of persons from whom petitioner and Sturzenegger could have solicited waivers, had they been in good faith in their efforts to comply with the order, even partially (R. 720, 735–7, 1972–3).

fused waivers with some qualification or on the ground there was nothing to waive. Three requests for waivers were undeliverable, four persons solicited were ascertained to be dead or to be liquidated corporations, and 20 cases of possible death or liquidation were pending. Secrets in the papers could be either "primary" or, if those of persons merely mentioned, "secondary". Seventeen of the 91 who consented were found not to be primarily involved and some papers as to which "primary" waivers were given were nevertheless not cleared by the Swiss Federal Attorney for lack of "secondary" waivers. Where the owner of a secret was dead and had no executor, each of his heirs was required to waive. This process of waivers and clearances had yielded 63,658 papers, and these were tendered [9] (R. 638, 659, 671–2, 117–8, 2032).

No books of account were tendered. Petitioner informed the court that it would not make full disclosure of the Sturzenegger books of account, since they would reveal "the aggregate of the secrets of all whose transactions are contained therein". Petitioner stated that it was considering the submission to the Swiss Government of a plan for photostating excerpts from pages of books whose entire contents were not covered by waivers and cleared, with the matters declared secret first being blacked out (R. 118–9, 137–8, 670, 2032).

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[9] It cannot be determined what percentage these papers represented of the 450 Sturzenegger jackets ordered to be produced (R. 2032, n. 7; *supra*, p. 9, n. 4). The Swiss Compensation Office investigators estimated these jackets as "containing files about 55,500" (R. 234–5) but this figure is not helpful because a "file" is a group of papers, "maybe two or three" (R. 806).

In response to inquiries from the bench, counsel could give no assurance that full compliance would be made, even if extensions of time were granted (R. 126–32). Accordingly, the court found, in a memorandum opinion dated November 16, 1953, that despite four years of elapsed time there was still "no reasonable likelihood plaintiff will be able to accomplish the full production required * * * such as was required by the Government of Switzerland in determining the same issues as are raised in this suit". Any less production being inadequate, the court denied further extensions, and on December 21, 1953, entered an order dismissing the complaint (R. 672–3, 679–80).[10]

The decision of the court of appeals of June 30, 1955.—The court of appeals (Circuit Judges Miller, Fahy, Danaher) unanimously affirmed (R. 2028–46). In brief summary, Judge Fahy's opinion for the court holds: The district court's findings on petitioner's control of the documents and its ability to produce them, except for the Swiss action, and on the materiality of the records are sufficient in form and definiteness and adequately supported by the record (R. 2035–6, 2041). The absence of the Sturzenegger records, in view of

[10] In *Kaufman* v. *Societe Internationale*, 343 U. S. 156, this Court ordered that the innocent stockholders of petitioner should be allowed to intervene to protect their interests in the assets, unhampered by the tactics of the management and by disagreements with it. In accordance with that decision, the allegedly innocent stockholders have intervened and still remain as parties plaintiff in the suit. See *Kaufman* v. *Brownell*, 247 F. 2d 553 (C. A. D. C.), certiorari denied, 355 U. S. 842. By its terms the order of dismissal entered against petitioner does not affect the claims of these intervenors (R. 679–80, 627–8).

their importance on the issue of petitioner's enemy taint, might, on a trial, give petitioner "a decisive advantage" and thus "due process of law is not violated by requiring their production as a condition to trial" (R. 2040–1). The handicap and risk of defeat need not be cast on the Custodian "when a plaintiff by action of its own government is disabled from complying with discovery rules generally applicable to litigants under the law of the forum". The Swiss Government, by its actions, sought advantages for itself and for all of its nationals, and so the disadvantage caused petitioner in this case is "fairly left" on petitioner, where the law of the forum places it (R. 2041, 2045). In other words, "it is not fundamentally unfair or arbitrary to require Chemie to comply with an order that is designed, in accepted legal fashion, to elicit the truth or, failing compliance, to dismiss its action, when the requirement is shown to have a very real relationship to the means of arriving at the truth of the substantive issues in the litigation" (R. 2041). The district court, from its years spent in efforts to obtain full discovery, was thoroughly acquainted with the factors involved and did not abuse its discretion in rejecting the alternative, deemed unsatisfactory by the court of appeals as well, of proceeding to trial without discovery and postponing final action until then (R. 2045–6).

The court found it unnecessary to pass upon the district court's power to dismiss under Federal Rule 37 (b); it held (R. 2038–9) that, in the circumstances presented, the district court, apart from its powers under Rule 37 (b), had the inherent power to dis-

miss the complaint—a power recognized as existing apart from Rule 37, by Federal Rule 41 (b) (Appendix, *infra*, p. 93).

The court of appeals nevertheless further postponed the dismissal in order to give petitioner still another opportunity to make discovery as ordered. It modified the decree to provide that the dismissal should not become effective until six months after the receipt of its mandate by the district court (R. 2046). A petition for rehearing *en banc* was denied on September 1, 1955 (R. 2048).

This Court, on January 9, 1956, denied a petition for writ of certiorari, and thereafter denied a petition for rehearing (350 U. S. 937, 976).

Proceedings following the denial of certiorari in 1956.—As the six months' period of grace was expiring, in July of 1956, petitioner moved for further time in which to comply, on the ground that it had now procured, by continued solicitation of waivers, some 192,000 documents (R. 1925–32, 1936–8, 1942, 1945–9).

These papers, like the 63,000 formerly tendered, did not purport to be all those of, or relating to, a given person but only to be papers concerning various persons of importance in the case (*cf.* R. 668 with R. 1929, 1938, 1945, 1948). At least some waivers not obtained in 1953 were still lacking, and the increase in papers was largely the product of "secondary" waivers, *i. e.*, waivers by persons mentioned in documents whose "primary" secrets had already been the subject of waivers (R. 1942). Few, if any, new waivers had been solicited (R. 1972–3). Again, as in 1953, no

books of account were tendered, but it was said that the Custodian would be permitted to examine, in Switzerland, excerpts from the books to the extent of the waivers and clearances obtained, on condition that authorization was first obtained from the Swiss Federal Council for the performance of an official act on Swiss soil, otherwise prohibited by the Swiss criminal code (R. 1951–3).

Petitioner offered a plan, already approved by the Swiss Government, with respect to papers and to portions of the books of account not released by waivers or cleared by the Swiss Federal Attorney. A "neutral expert" would be appointed, with the approval of the court, the parties, and the Swiss Cabinet. He would proceed to screen those papers and portions of books of account not released, under an oath of secrecy as to their contents, given in accordance with Swiss concepts and to be arranged in a manner to be agreed upon with the Swiss Federal Attorney. This "expert" would determine which of the documents, entries, and accounts were relevant to the suit and petitioner would then "endeavor" by letters rogatory to obtain the production of such records (R. 1952–5).

The court ruled that, under the laws of the United States, there is no provision for such a neutral expert, acting in the place of the court, to decide which papers are relevant, and that nothing short of full production would constitute compliance. In the circumstances, the court concluded that further extensions of time would be futile. The court found that more than seven years after the issuance of the original production order there was still no assurance

whatever that the papers would be produced (R. 1980, 1998–2000). An extension of time pending appeal was denied by the court of appeals and by the full bench (R. 2018, 2022–3).

Thereafter, on August 6, 1956, the district court, finding that there had been no compliance with the order for discovery in the time permitted by the court of appeals, entered an order upon the 1955 mandate of the court of appeals affirming the 1953 order of dismissal and adjudging that the petitioner's complaint stood dismissed with prejudice (R. 2017–8, 2026–7).

The court of appeals affirmed, *per curiam,* expressing its approval of the opinion below (R. 2058–61). A petition for rehearing *en banc* was denied (R. 2069).[11]

SUMMARY OF ARGUMENT

The dismissal of petitioner's complaint for failure to make discovery as ordered was justified by the circumstances, consistent with due process, and well within the power of the district court.

I. The order for discovery was eminently proper. While the documents ordered produced were those of Sturzenegger & Cie., nominally an entity other than petitioner, petitioner had full control of the rec-

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[11] Pending the appeal, in October 1956, the Swiss Government revoked the Swiss Federal Attorney's order seizing the Sturzenegger papers, on the ground that by the entry of the district court's order on the mandate the suit had been dismissed. It reserved, however, the right to renew similar measures, if necessary (R. 2054–5). Petitioner, by affidavit, explained that this revocation has not brought about any change in the situation (R. 2052–3), and respondents agreed.

ords. The lower courts' conclusion as to control was grounded on an abundance of evidence showing the common origin of the two companies in I. G. Farben; their common service for I. G. Farben; their common management, personnel, and activities; the administration by one of the assets of the other; and their cross-ties of ownership. In reality, as the district court found, Sturzenegger & Cie. and petitioner were each half of a single entity. This was the conclusion, too, of the Swiss Government which, when it desired to investigate the allegedly German character of petitioner and its claimed assets, investigated petitioner and Sturzenegger & Cie. together, as one.

II. The Sturzenegger records are an indispensable source—in many respects, the sole source—of information on such matters as the use and disposition of petitioner's assets, the ownership of its stock and of the property in issue in this case, and the enemy taint of the circle of insiders who owned and controlled petitioner. There is evidence which suggests strongly that in these and other areas petitioner and Sturzenegger & Cie. were so significantly involved with I. G. Farben, an enemy alien, that production of the records might well defeat petitioner's claim. The unproduced records were therefore essential for purposes of determining the decisive issues raised by petitioner's suit—whether petitioner is enemy-tainted and whether it really owns the property which it sues to recover. If a failure to produce important materials should enable petitioner to recover, where otherwise its claim would have been

defeated, there would be a clear perversion of the ends of justice.

The Trading with the Enemy Act was deliberately aimed by Congress at exposure of such devious concealment of enemy property as is here, reasonably on the facts, suspected and alleged. Full production of pertinent facts is required, therefore, not only by the duty generally to disclose records of one's own relevant activities, but also by the specific provisions and policies of the Trading with the Enemy Act. Certainly, unless there are overriding reasons why the case should go forward despite the nonproduction—a nonproduction which creates a situation in which the trier of facts is left without an adequate basis on which to decide—the complaint must be dismissed.

III. The excuse offered for nonproduction is that petitioner (which, incidentally, has enjoyed the benefit of full production by the United States) was prohibited from making discovery by an order of the Swiss Federal Attorney, based on Swiss secrecy laws. These laws provide for the secrecy of business information, in the discretion of Swiss executive officials. They were properly rejected as excusing nonproduction for two reasons. *First,* they are not uniformly applied. They have not limited petitioner. Repeatedly and without hindrance, petitioner, when it has suited its own purposes, has produced "secret" information from the same source—the files of Sturzenegger & Cie.—to which the Custodian is denied free access. Moreover, the Swiss authorities, in their own investigations of petitioner,

have had full access to all of the Sturzenegger records. *Second,* lack of uniform application apart, the Swiss secrecy laws do not control because they are contrary to the law of the forum. That law governs on such procedural matters as discovery and the giving of testimony, and it gives no privilege or secrecy for the records here involved. Quite the contrary, the law of the forum imposes a general duty to give testimony, disclose relevant information, and make discovery of documents—the essential procedural requisites if a court is to decide the case on *all* the relevant facts. And without all the relevant facts, the court cannot in good conscience enter judgment for the moving party.

This basic principle is reaffirmed by the statute under which this suit is brought. The fundamental purposes of the Trading with the Enemy Act require that an allegedly friendly or neutral plaintiff disclose all material facts bearing on the issue of enemy taint and on the ownership of the property for which suit is brought. The Swiss secrecy laws, whether viewed as criminal laws proscribing the disclosure of information or as a foreign law of privilege, may not prevail over the law of the forum, found both in the procedural law and in the governing Act. Petitioner may not be singled out among litigants of all nationalities and immunized, by the laws or acts of its own Government, from compliance with duties essential to the administration of justice in our courts. Thus, it is not simply a question of whether American or Swiss law "controls." It is, more accurately, a question

whether any foreign law can be so applied as to require an American federal court to go forward with a civil litigation where one of the essential requisites for fact-finding, namely, availability of all the pertinent documentary evidence, is thereby prevented. The answer must be in the negative, at least where the records are of decisive importance in the case. Precise precedents for rejection of such excuses and for the order of dismissal entered in this cause are found in the English cases based on prizes taken of Swedish cargoes, where a Swedish secrecy law was unsuccessfully pleaded in resistance to orders of discovery.

IV. The remedy of dismissal was within the power of the district court. Federal Rule 37 (b) gives power to enter "just" orders, among them an order of dismissal, on the refusal of a party to comply with an order of discovery. The refusal to comply is implicit in petitioner's failure to produce records of which it and its *alter ego* had possession and the rejection of the proffered excuse for such failure. Another source of power to dismiss is the authority to make such orders as may be necessary to enforce the Trading with the Enemy Act, granted in Section 17 of the Trading with the Enemy Act independently of general jurisdiction. And a third source is the inherent power of a court of equity to make reasonable orders, among them an order of discovery, in aid of a just disposition, and to dismiss a complaint for the unexcused failure of compliance. In the last analysis, petitioner's contention is that a federal court is powerless, and must proceed with a litigation even though it has

been made repeatedly clear beyond all doubt that the court will not receive from the plaintiff all the relevant data from which the validity of its claim can be determined. Such a contention must fail.

ARGUMENT

The Court has invited counsel to discuss, among other things, the power of the district court to dismiss the complaint under Federal Rule 37 (b) and the propriety of the dismissal. The propriety of the orders of discovery and of the dismissal for noncompliance therewith are of determinative significance on the question of the power to dismiss (*Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 350, 354), and we will therefore discuss, first, the questions bearing on the propriety of the dismissal and, thereafter, the question of the power to dismiss.

The argument below will take up (1) the evidence as to the identity of petitioner and the Sturzenegger firm, as showing that petitioner had control of the records and but for the actions of the Swiss Government would have produced them (Point I, pp. 29–37); (2) the showing that the records not produced were of primary and even decisive importance in the determination of the issues in the case (Point II, pp. 38–56); (3) the considerations supporting the conclusion that the Swiss secrecy laws and the Swiss order afford no basis for allowing the case to go forward, in the face of the failure to make discovery of such essential records as these (Point III, pp. 56–73). Finally, we will describe in Point IV (pp. 73–84) the three sources of the district court's power to make

such an order of dismissal—Federal Rule 37 (b), to which the Court referred in the order granting certiorari, Section 17 of the Trading with the Enemy Act, and the inherent powers of the district court as a court of equity.

I

THE ORDERS BELOW WERE BASED ON EVIDENCE SHOWING A VIRTUAL IDENTITY BETWEEN PETITIONER AND STURZENEGGER & CIE., THE FIRM WHOSE RECORDS IT WAS ORDERED TO PRODUCE

The district court initially made *prima facie* findings that petitioner had control of the Sturzenegger records in 1949 (*i. e.*, before the Swiss Federal Attorney issued his order with respect to the records) (R. 337–8). In February 1953, after four years of proceedings, Chief Judge Laws extensively reexamined the matter and reaffirmed his conclusion. "Through the interlocked web of corporate organization, management and finance there runs the thread of a fundamental identity of individuals in the pattern of control. On further consideration, the Court now definitely concludes that the Sturzenegger papers were and are in the possession, custody or control of plaintiff and that except for their confiscation by the Swiss Federal Attorney, plaintiff would be able to produce them" (R. 615).

The district court's detailed findings and the conclusion of control were explicitly approved by the court of appeals in its opinion of June 30, 1955. "For any purpose relevant to Rules 34 and 37 the findings are sufficient in form and definiteness; and,

for purposes of our favorable review, find adequate support in the record" (R. 2036).[12]

In the findings on control, the district court found an intimacy verging on identity between petitioner and the Sturzenegger firm, whose records petitioner was ordered to produce. This virtual identity, of course, supports the order of discovery. In addition, when taken with the evidence discussed in Point II (pp. 43–54, *infra*) as to the importance of the missing papers, the identity of petitioner and Sturzenegger supports the propriety of the dismissal of the complaint of the one for the nonproduction of the papers of the other.

The findings of control and identity are supported by a wealth of evidence on the ties between petitioner and the Sturzenegger firm—evidence showing the creation of petitioner by the Sturzenegger firm, their joint personnel and activity, their physical proximity, the performance by the one of the other's functions, and the existence of cross-ownership. Separate findings on each of these factors were made by the district court (R. 611–3).[13]

Petitioner was created in 1928 by Greutert & Cie. (the name of the Sturzenegger firm until 1939) on behalf of I. G. Farben. The court so found (R.

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[12] Petitioner has abandoned earlier attacks on the regularity of the proceedings and the form of the findings. See Pet. for Cert., No. 500, October Term, 1955, pp. 10, 17; Brief in Opp., pp. 16–21.

[13] While the support for the findings is discussed, there is no reason for the Court to depart from the ordinary two-court rule. *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214; *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275.

611–3), and its finding is supported by the report of the Swiss Compensation Office that Greutert & Cie. founded petitioner pursuant to the plan of Hermann Schmitz of Farben (R. 211–3, 248). Counsel for petitioner, who describes Schmitz, chairman of Farben's board, as "the most prominent individual at the head of I. G. Farben", concedes that petitioner was "sired very greatly by the Hermann Schmitz influence" (R. 63–5). He says further that "[t]here was no secret about the fact that the Germans of Farben had sponsored both" petitioner and the American I. G. Chemical Co., the predecessor of the General Aniline & Film Corporation, whose stock petitioner now claims (R. 89).

The Greutert firm was itself a creature of Farben. It was owned, from 1931, by Visca A. G., a company whose stockholders, Mr. Hans Sturzenegger said, were "people closely connected with I. G. Farben" (R. 63–5, 88–9, 216, 268–71, 1717, 1279–85, 1847–63, 1882–94, 1712–22). According to Alfred Merton and Rudolf Euler, for a time co-owners with Visca of the Greutert firm, Visca was operated in Farben's interest and was just "one of the many names" under which Farben appeared (R. 216, 269–71, 1844–7, 1853–63, 1873–9, 1887–8). Counsel for petitioner admits the mounting influence on the Greutert firm, as time went on, of Hermann Schmitz and other "people affiliated with I. G. Farben" (R. 63–4, 88–9).

Both petitioner and the Greutert firm depended on Farben's money. The Swiss Compensation Office reports that Farben's "great balances", deposited

with Greutert, maintained Greutert in business, and that "large assets" of Farben, kept with Greutert, were transferred to the petitioner after petitioner was created. Indeed, a Greutert account in which Farben assets were carried was "the precursor of the idea of establishing" petitioner (R. 211, 215, 270, 295–6, 776–83, 1212–3, 1277–9).

The early intimacy between petitioner and Greutert-Sturzenegger continued. The two were managed by the same persons, in both the prewar and wartime periods. Until 1940, Hermann Schmitz of Farben was chairman of the board of petitioner and, in the words of the Swiss Compensation Office, he "held the reins" in petitioner's affairs (R. 89, 214). Petitioner indeed pleads, in answer to the Government's counterclaim for taxes, that in the transaction there involved it was caused by Schmitz "to act in a nominal or straw capacity for I. G. Farben" (R. 333–333a). Schmitz's influence over the Greutert-Sturzenegger firm was what one would expect in the light of his close personal friendship with Mr. Greutert and Farben's position as concealed owner (through Visca) and as source of the "great balances" which maintained Greutert-Sturzenegger (R. 63–4, 269–70, 782, 1712–22, 1843–7, 1879–85, 1889–90). In 1940, Schmitz retired from the scene, this step being part of a larger plan to Americanize General Aniline (ostensibly owned by petitioner) and thereby avoid its seizure by American authorities in the event of war, and Mr. Hans Sturzenegger succeeded him (R.

214, 216–23, 226–8, 240).[14] Mr. Sturzenegger, the sole unlimited partner in his firm and a managing agent of petitioner, is, the court found, the dominant personality in his firm and perhaps in both companies (R. 611, 29, 56–7, 98, 169–72, 269, 756–7).

Petitioner and Sturzenegger & Cie. have been intimate, physically and otherwise, and have had few relationships except with I. G. Farben and each other. The Sturzenegger firm is, in Mr. Sturzenegger's words, a "small private bank". It has never done general commercial business and all of its customers have been connected with Farben, petitioner or with the Sturzenegger circle of holding companies (R. 97, 815–19, 965–74, 984, 1833–4). Mr. Sturzenegger states that after the war broke out petitioner succeeded Farben as his biggest customer (R. 817–8, 1198–1200), and petitioner describes Sturzenegger & Cie. as its "house bank" (Brief, pp. 12, 15, n. 15). All—petitioner, Mr. Sturzenegger and the Swiss Compensation Office—speak of the "close" or "very close" relationship between petitioner and Sturzenegger & Cie.; the latter refers to their "partial personal union" (R. 251, 297–8, 870–1, 969; Brief, p. 15, n. 15).

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[14] The contract by which Farben guaranteed the dividends on petitioner's stock in return for an option on petitioner's assets, at cost, was publicly canceled. Of this cancellation, the Swiss Compensation Office states, simply, "I. G. Farben had to reckon with the entry of the U. S. A. into the war. If the option right was still in existence, the GAF would be confiscated and would be lost to them" (R. 227–8). It is the Custodian's position that the cancellation, and the entire plan to Americanize General Aniline, were not *bona fide* R. 1701–11, 1670–7, 1683–6).

Until 1936, petitioner was nothing but a desk-drawer corporation in the Greutert-Sturzenegger premises. Then it moved to an adjoining villa, with a backdoor passageway connecting the two (R. 85–6, 763–4, 803–4, 819–20). The separation was purely formal. Petitioner's mail was routed by a form naming two employees of Greutert & Cie. who were not employees of petitioner (R. 86–7, 98, 102–3, 105–6). The two firms procured a 15-year contract for a joint and interconnecting switchboard and the files of each remained in the possession of the other as work required (R. 86, 98, 102, 106, 553–4). When Swiss companies in 1940 prepared auxiliary offices for use in the event of invasion, the two used such an office jointly, placing the files they desired to preserve in charge of an employee of the Sturzenegger firm (MS. R. 6611–3; R. 798–802, 1240). In 1945, Sturzenegger's chief clerk, Walter Germann, a nephew of Mr. Greutert, transferred to petitioner as its general manager. He grew to learn about petitioner, Mr. Sturzenegger explained, by working in the Sturzenegger firm (R. 690–3, 762–3, 773–5, 1251).

The Sturzenegger firm has always performed for petitioner its only significant function—the custody and management of its assets. Petitioner is a holding company; yet it buys all its assets from Sturzenegger, has no safe-keeping box of its own, and, after it buys securities, it leaves them with Sturzenegger for custody and even "administration" (R. 89, 259, 768–70, 814–5, 1086–8; 1140, 1212–3, 1227–31). The "administration" of petitioner's assets by the Sturzenegger firm is in fact the exercise of exclusive control. By

a device known as a "consortium" or a "secretariat", petitioner and Sturzenegger pool their assets in the form of accounts on Sturzenegger's books. Though these accounts are financed "chiefly" by petitioner (in one case, to the extent of 90% of a consortium with assets of sfrs. 40,000,000), they are subject to the exclusive control of the Sturzenegger firm (R. 276–7, 296–8, 776–98).

There are, lastly, the ties of cross-ownership. Petitioner has been a silent partner in Greutert-Sturzenegger since 1933. In 1943, it held a 44% interest under a partnership agreement by which it participated in both profits and losses. It was entitled to be informed of the partnership affairs, and the partnership books, ostensibly secret under a clause aimed at outsiders, were available to it through a representative (R. 271, 327–327b, 611–4, 881, 1813–6).

As if in reciprocation for this interest of petitioner in H. Sturzenegger & Cie., the Sturzenegger Circle of companies, the district court found, owns 39% of the stock in petitioner (R. 613, 124, 176, 250).[15] The companies known as the Sturzenegger Circle comprise the Sturzenegger firm itself and four Swiss holding companies, Industriebank, Perpetua, Rigidor and Sopadep. The five own each other and, the court

[15] Petitioner, in its brief in the court of appeals in 1955, admitted that the Circle owns the 100,000 shares of preferred stock of petitioner and about 36,500 shares of the outstanding 250,000 common shares, a total of 39% (Brief in No. 12140, pp. 27–8, 35). The Circle's ownership of 39% of the stock of petitioner was even more effective than might ordinarily be the case, for another 24% was owned by General Aniline in which, in turn, petitioner held a 93% stock interest (R. 176–7, 222, 237–9, 148–50).

found, are so linked by means of options, pledges and loans as to form "a tight chain of control" over petitioner (R. 612).

The four Circle companies other than H. Sturzenegger & Cie. have no purpose or activities except to hold interests in each other and in Sturzenegger & Cie. (R. 286, 812, 820, 1237–43, 1248, 1262–71, 1298–1309). Mr. Sturzenegger confirmed the details of the Circle's cross-holdings as reported by the Swiss Compensation Office, whose chart of the Circle's relationships indicates the circular nature of the ownership (R. 260, 281–90, 1233–50, 1262–74, 1284–1307, 2082). Counsel for petitioner describes the "intertwining" of the Circle companies by explaining that the owners of the Greutert-Sturzenegger firm were petitioner, Mr. Greutert and Industriebank; that the largest stockholder in Industriebank was Rigidor; that the Rigidor stock is under option to Perpetua; and that the largest stockholder in Perpetua is Greutert-Sturzenegger, thus completing the Circle (R. 67–71).

The Circle companies, aside from the ownership of each by the others, have eleven natural persons as stockholders (R. 175). Mr. Sturzenegger and five others (Mollwo, Germann, Haller, Werder and Sutter) were long-time employees of the Greutert-Sturzenegger firm (R. 268–9, 690–3, 764–7, 773–5, 798–802, 812–4, 867–70, 880–6, 1044–5, 1059, 1251–2, 1838–43). The remaining five (Grieshaber, Cassani, Du Bois, Auer and Wolfensperger) were chosen, Mr. Sturzenegger said, because they were "close" and

"old school friends" of Mr. Greutert (R. 886–90, 1083–4, 1138–9, 1201–6, 1250–2, 1901–2). All eleven were "integrated" by means of loans from the Circle companies of money with which they bought their stock, pledges of the stock to secure these loans, and options to buy the stock on the death of the stockholder (R. 175, 221–2, 225–6, 247, 260, 281–90, 880–2, 1240–2, 1249–50, 1256–61, 1263–73, 1296–1304, 2082). The Swiss Compensation Office notes that the "interdependence" of the Circle companies was brought about because "[t]he group gathered around Greutert had to strengthen their position so that third parties not belonging to the Complex or representing special interests could not gain influence by purchase or inheritance" (R. 225).

The integration of the Circle, which owns and is owned by H. Sturzenegger & Cie., the ownership of 39% of petitioner by the Circle, and the ties, set out above, between petitioner and Sturzenegger & Cie., show that petitioner and Sturzenegger in reality are not separate entities, but rather part of each other. This was the silent affirmation of all concerned when the Swiss Compensation Office made its investigation of the German character of petitioner. That Office set out to examine all the records, premises and officers of both petitioner and Sturzenegger, and the records were handed over without objection (R. 230–5, 254–8, 773–5, 793, 796, 804–12). As the district court said, "Both were examined together, as one" (R. 613).

II

LESS THAN FULL DISCLOSURE OF THE STURZENEGGER RECORDS WOULD DEPRIVE THE COURT AND RESPONDENTS OF INFORMATION DECISIVE IN THE DETERMINATION OF THE ISSUES

Petitioner urges that it made substantial discovery when it tendered 192,000 Sturzenegger papers in 1956—as it previously urged in 1953 when it tendered some 63,000 Sturzenegger papers (Brief for Pet. pp. 17, *et seq.*, 39–40; Pet. for Cert., No. 500, October Term, 1955, pp. 14–5, 30). Both sets of papers were obtained by the process of waivers of secrecy for individual documents (by the primary and secondary owners of the secrets) and releases of these documents by the Swiss Federal Attorney. At no point were the Sturzenegger books tendered. Like the papers, they were to be disclosed only partially, *i. e.*, to the extent that the process of waivers and releases permitted (*supra*, pp. 17–8, 21–2; R. 1942, 1951–3, 1987, 2032).

So long as the discovery offered is less than the 110 books and 450 jackets ordered to be produced (*supra*, pp. 8–9), there is no real or measurable significance in the volume of documents produced.[16] Bulk is not

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[16] Without mention of the 110 books, petitioner argues that the 192,000 documents offered are "numerically" more than the "55,000 documents" which, it says, were all that were ordered to be produced (Brief, pp. 13, n. 12, 18, 39–40). (In the court below it argued that the number ordered produced was "at most 165,000" (Brief for Pet. in Nos. 13460 and 13527, p. 15; R. 1992).). In requiring the production of "55,000 docu-

the object. The district court said, on the tender of 63,000, that there was little difference between "63,000 out of 100,000, or maybe 63,000 out of 63,200. The 200 might be the vital papers." (R. 127–8). On the tender of 192,000, the district court commented that it did not think these were all that the Swiss Compensation Office had inspected and it again emphasized that its order required production of all the records that the Swiss Compensation Office had inspected (R. 2002, 129–30, 340).

Partial discovery is no discovery, particularly when the partial discovery is the product, first, of solicitation of selected individuals for individual waivers of secrets and, second, of clearances of individual documents in the discretion of a foreign government offi-

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ments", petitioner continues, the order was insufficiently specific because the documents were returned to the files after their inspection by the Swiss Compensation Office and now cannot be identified (Brief, pp. 13, n. 12, 5, 8, 24, 39–40).

These arguments were made and rejected below (R. 337, 397–9, 412–3; Briefs for Pet. in No. 12140, pp. 77–8; Nos. 13460 and 13527, pp. 10, 14–5, 18–9). They are grounded on a misstatement of the terms of the order of discovery. The court did not order the production of 55,000 or any other given number of documents but rather the production of 450 jackets of the Sturzenegger firm examined by the Swiss Compensation Office. The figure of 55,000 was only an estimate by the Swiss Compensation Office investigators of the number of "files" (not, as petitioner says, "documents") contained in the 450 jackets or dossiers (R. 340–1, 234–5, 607). Mr. Sturzenegger testified that a "file" is a group of papers: "maybe two or three". The investigators, he said, had "access to all the files", "went through everything" and the 450 jackets "seems to be the bulk, maybe even all" (R. 806–10).

cer (*supra*, pp. 17, 21–2).[17] When a court has ordered production of complete jackets and account books, the party so ordered cannot cull the jackets or books or exclude individual files or entries. *United States* v. *National City Bank of New York*, 7 F. R. D. 68, 70 (S. D. N. Y.); *In re Indusco Inc.*, 15 F. R. D. 7 (S. D. N. Y.).

The district court, mentioning the possibility of secret agreements as to title, expressed itself strongly that "arrangement and sorting" of documents was not discovery. "You don't let somebody screen them * * *. When you discover papers, you don't scrutinize them one by one and list them up, and let somebody say what the other side sees and doesn't see" (R. 126–8). To counsel for petitioner, the district court said, "This discovery means showing them all you have"; in the process of selection and obtaining of waivers "you might keep back the most material thing in the whole outfit * * *. I mean the [Sturzenegger] Bank * * *. If we put discovery that way, it isn't discovery. It is taking a peek at part of what the man has * * * not everything he has" (R. 130).

In 1953, the district court had held that "there is no reasonable likelihood plaintiff will be able to ac-

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[17] In 1953, petitioner disclosed the number but not the names of those who had been unsuccessfully solicited for waivers (*supra*, pp. 17–18). In 1956, it disclosed neither number not names, stating only that "several" have still not waived (R. 1942). The papers produced by this process of waivers are described not as all those in a file or all those of the person solicited, but only as papers relating to important or most of the main actors (R. 1928–9, 1945–8, 1992; Brief, p. 19, n. 20).

complish * * * full production" (R. 672–3, 126–32). The court of appeals affirmed, noting that petitioner was unable to assure the court that full compliance would be made (R. 2032). In 1956, these rulings were shown to be good prophecy, for there was still no full production and no prospect of it.

In 1956, petitioner, having again offered only partial discovery, offered a plan for further discovery. Petitioner's plan to accomplish this further, but still not full, discovery called for the appointment of a "neutral expert" who would be subject to secrecy under Swiss law and who would examine the papers to determine what parts of them he deemed, in his discretion, relevant to the issues in the case. Petitioner would then, by letters rogatory, "endeavor" to obtain production of the papers so determined to be relevant (R. 1952–5). To the court below, petitioner said that if everything else failed it would "furnish a copy of the document with the particular name blocked out". (Brief in Nos. 13460 and 13527, p. 27).

The plan for a neutral expert would require the court to delegate the function of determining relevancy to an officer beyond its control, pledged to secrecy under the sanctions of Swiss laws. This aspect of the plan, aside from its other defects,[18]

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[18] By providing for the approval of the expert by the Swiss Government, the plan would interfere with the court's control over its agents (R. 1955, 2000–1). By granting the expert the right to determine relevance, the plan would deprive the Alien Property Custodian of his right to inspect the records through his counsel, familiar with the Government's theories and with the evidence. Cf. *Jencks* v. *United States*, 353 U. S. 657, 668–9. Lastly, the pledge of secrecy under Swiss law, to be admin-

would alone require its rejection as inconsistent with minimal standards governing the responsibility of courts in the conduct of litigation. *Cf. Schwimmer* v. *United States*, 232 F. 2d 855, 864–5 (C. A. 8).[19] A court cannot abdicate its duty to pass on disputed issues of relevancy. Cf. *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 256–9. And, certainly, in the areas in which it may delegate authority, it must select agents responsible to it, rather than to a foreign government. As the district court held, "under the laws of the United States, there is no provision whatever for a neutral to decide what papers are relevant or what are not, in reference to this case" (R. 1999). Petitioner's plan was therefore held inadequate. The district court found that, though seven years had passed, there was still "no assurance whatever" of production (R. 1998), and the court of appeals concurred (R. 2059–60).

The concession as to the relevancy of the Sturzenegger papers (R. 615, 2036, 2072, 2081, 2084; Brief for Pet., p. 12) and the two-court rule might make it seem unnecessary to reexamine the repeated find-

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istered to the expert (R. 1955), would reintroduce by a back-door the Swiss secrecy laws held to be inconsistent with American law (*infra*, p. 65).

[19] In *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corporation*, 16 F. R. D. 513 (S. D. N. Y.), relied upon by petitioner (Brief, p. 41), the sole issue was the quantity of goods bought and sold by defendant in a given period. To keep from the plaintiff, a competitor, irrelevant details of defendant's business, the court appointed an accountant to make the inspection. There was no question of secrecy as against the court, and none as to the court's control over its agent or the need for broad discovery by the opposing party.

ings of the courts below, between 1949 and 1956, that only full production of the Sturzenegger papers, inspected by the Swiss Compensation Office on the same issues, would be adequate discovery (R. 34, 77–9, 126–32, 337–41, 616, 672–3, 1999, 2002, 2060). We stress, however, that the courts below did not merely hold the records generally relevant; they found that they were essential. The district court ruled that the Sturzenegger records, among the "best possible indicia of [petitioner's] ownership and control," are of "pressing importance", and that their unavailability "well might prove to be a deciding factor in the outcome of this suit" (R. 615–7). The court of appeals agreed. "For the District Court to hear and decide the case without [the Sturzenegger records] might give plaintiff a decisive advantage, leading to recovery of extremely valuable property notwithstanding, were the papers produced, Chemie might be shown to be enemy tainted, in which case the property would be withheld by the United States under existing legislation" (R. 2040–1). Under the Trading with the Enemy Act and the pleadings, there are two issues in this case—petitioner's alleged ownership of the General Aniline stock for which it sues and its freedom from "open or concealed enemy taint" (*supra*, p. 5; Brief for Pet., p. 7). See *Kaufman* v. *Societe Internationale*, 343 U. S. 156, 159. The Sturzenegger records are indispensable to any consideration of these issues.

The intimacy between petitioner and Sturzenegger, already discussed above (pp. 30–7), gives only a suggestion of the importance of the Sturzenegger

records to a determination of petitioner's character. Much more can be shown. For instance, petitioner's title to the General Aniline stock it seeks to recover can be examined only in the Sturzenegger books. According to the alleged chain of title to this stock, set forth in the claim filed by petitioner under Section 9 (a) of the Trading with the Enemy Act (Appendix, *infra*, p. 87); Greutert-Sturzenegger subscribed to all of the General Aniline stock on its issuance in 1929 and 1930, thereafter transferred and recalled it in a variety of transactions, and finally passed it to petitioner by a number of transfers, most of which took place as late as 1940 and 1941. Forty transfers of the stock have taken place. Greutert-Sturzenegger was a party to no less than 36 of the 40 transfers (R. 1811–12, 1733–9).

Forty-seven documents are attached to petitioner's claim to prove this chain of title—letters, sales notes, options, and excerpts from books of account (R. 1728–1809). Of these, 23 were not to be found in petitioner's files and had to be supplied to it by Mr. Sturzenegger from the records of the Sturzenegger firm.[20] Petitioner's manager stated that these documents were needed to fill in the "gaps in the chain of proof" (R. 704).[21] It is plain that petitioner cannot prove its title without the Sturzenegger records and it fol-

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[20] R. 697–715, 1753, 1761–7, 1784–90, 1797–1809.

[21] Indeed, gaps and ambiguities, some caused by falsely dated and back-dated documents (MS. R. 11681, 11692–7), were recognized by counsel as still remaining, even in the alleged chain of title, and Mr. Sturzenegger undertook to "assemble other data" (R. 1316–22). The Government is entitled to equal, full access to "assemble" contrary data.

lows, we submit, that the Custodian cannot be required to disprove that title without those same records.

Petitioner repeatedly asserts that there is no showing that the Sturzenegger records contain material "in any way damaging to petitioner's claim" (Brief, pp. 8, 12, 33, 38). The point is of dubious relevance since petitioner itself must rely on those records, but there is in fact a great deal to suggest that the records will damage petitioner's claim, specifically, by showing involvement of petitioner, Sturzenegger and their claimed assets with I. G. Farben. Before and during the war, Hans Sturzenegger (and Greutert before him) cloaked Farben interests in Greece and Rumania,[22] helped Farben cloak its companies in Holland, Belgium, England, Australia and Canada,[23] recommended to Farben persons who would cloak its assets in South America,[24] kept Farben's deposits,[25] received monies for it from abroad without mention of any name,[26] lent it money, [27] kept its securities,[28] passed to it mail from cloaks in South America,[29] and forwarded its mail to Japan via Siberia.[30] Petitioner itself engaged in comparable activities.[31]

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[22] R. 317, 1129–37, 1186–98, 1626–31, 1663–8.

[23] R. 313–5, 322, 1078–80, 1142–3, 1183–6, 1631–52, 1654–6.

[24] R. 101, 318–20, 862–3, 886–943, 1564–7.

[25] R. 1048–54, 1056–7, 1586–7, 271–3.

[26] R. 1575, 979–99.

[27] R. 273, 962–5, 1010–14, 1200–1, 1668–70.

[28] R. 957–62.

[29] R. 318–20, 862–3, 886–917.

[30] R. 1525–35.

[31] Throughout the war, petitioner owned, through a subsidiary, a sales company operating in enemy-occupied France

There is no reason to think that these enemy associations did not pervade all the areas which are crucial in this case. There is affirmative reason to believe that they did. The Swiss Compensation Office discloses that "large assets" of I. G. Farben were kept in a consortium account in Greutert-Sturzenegger and that in the course of time "these assets were transferred to I. G. Chemie [petitioner]" (R. 211, 296). And though petitioner claims to have been the owner of over 90% of the stock of General Aniline, its counsel admits that "Farben was the operator" of General Aniline, "Chemie's interest being virtually nil in the operation of the business" (R. 91–2). We know, too, that the Greutert-Sturzenegger dealings in the General Aniline stock, before it was transferred to petitioner in 1940 and 1941, were attended by a bewildering variety of nomineeships, deferments of payment of purchase price, options, and sales on behalf of consortia.[32] Plainly, the Sturzenegger books must be examined to see whether the stock in General Aniline was one of the "large assets" of Farben and whether it passed through the Greutert-Sturzenegger firm to a series of Farben nominees, last among them peti-

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as an admitted cloak for I. G. Farben (R. 99–100, 228, 249, 308–9, 1105–21, 1910–7). Its subsidiaries also assisted Sturzenegger in cloaking for Farben in Holland and British India (R. 313–5, 863–7, 1078–81, 1142–3, 1173–86, 1631–52, 1654–63). With Sturzenegger, petitioner held title to a majority interest in Farben's house bank in Berlin, admitted by petitioner's counsel to have been operated by the Germans (R. 68, 100–1, 1101–4).

[32] R. 1738–1809, *e. g.*, 1740, 1757–8, 1770–1, 1779–80, 1785–6, 1792–4.

tioner; whether, as the evidence indicates is so likely, the transfer of the stock in suit from Sturzenegger & Cie. to petitioner was subject to strings and reservations on behalf of I. G. Farben.[33]

The district court, drawing on its experience in alien property cases, has emphasized the possible significance of secreted papers on the issue of enemy ownership (R. 127–32, 2002–3). There is good reason, on the facts, to suspect that the Sturzenegger records contain not one but many secreted papers.

Other issues, too, may be resolved only after examination of the Sturzenegger books. The Swiss Compensation Office has reported, and the court found, that Greutert-Sturzenegger controlled a majority of the stock in petitioner. The dealings in and with this majority interest are discoverable only in the Sturzenegger books (R. 613, 235–9).[34]

Petitioner's shares were bearer shares until after World War II, and in consequence, the Swiss Compensation Office points out, it is extraordinarily difficult to learn the identity of its stockholders. This

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[33] Ascertainment of the facts of the ownership of this stock has always been frustrated by inability to have access to the Sturzenegger records. The Securities and Exchange Commission also failed when it sought to determine the true owners of the stock in General Aniline. It found that no one, not even the directors of the company, knew who were the beneficial owners of the stock. *Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission*, Parts 4 and 5 (G. P. O., 1942), pp. 135, 137–43, 144–151.

[34] The Swiss report states that this situation continued "until 1940", but the significance of the date seems to be only that the agency made a detailed survey of petitioner's stock ownership in that year (R. 237–41, 1624–5).

knowledge can apparently be obtained only from the Greutert-Sturzenegger books. The Swiss investigators found lists of stockholders in the Sturzenegger "deposit books" and the entire section of their report on the stock ownership of petitioner is based on these lists (R. 291, 235–9).

The Swiss Compensation Office report is hardly reassuring. The Sturzenegger firm, it seems, "managed large blocks of I. G. Chemie shares for third parties" in such manner that "more shares than were issued were at times entered in the deposit books". This was done by means of "technical manipulation" which "might appear strange" but is "not surprising" (R. 291, 237–8). The firm, the report adds, was "in a position to procure missing items" from "friendly or intimate" firms (R. 291–2).

The evidence in the Sturzenegger & Cie. "deposit books" as to dealings in the majority stock interest in petitioner is, of course, of vital significance on the issue of the enemy character of petitioner. No matter what the likelihood that the "friendly and intimate" firms involved were enemy-connected, the custodian would be entitled to see these books as sources of relevant evidence. But in view of the manifold connections between the Sturzenegger firm and I. G. Farben, the Custodian must have access to these books, for their evidence may well be conclusive against petitioner's claim.

So, too, with the evidence of the management by Sturzenegger of petitioner's assets, by means of the consortia and secretariat accounts mentioned above (at pp. 34–5). The Swiss Compensation Office re-

ported, and Mr. Sturzenegger confirmed, that these consortia and secretariats were intended for multiple purposes of concealment. They were used to keep "information" and profits out of petitioner's balance sheet; they were a "reservoir" from which funds could be and were transferred to cover losses (R. 296–7, 790–5). Such concealment must give way in this case, under the Trading with the Enemy Act, where petitioner's enemy connections are at issue. Detailed knowledge of the purposes for which petitioner's resources were used, the companies and individuals who drew on them, and the countries of warring Europe in which they were employed is indispensable to any ruling that petitioner is free of enemy taint. The information, again, is not in petitioner's books, where it should be (aside from the dubious nature of those books, *supra,* pp. 12–3), but only in the Sturzenegger books.

In overall aspect, this case represents a claimed metamorphosis of petitioner and its owners (the Greutert-Sturzenegger firm and its Circle) from German to Swiss character. There is no dispute that in the beginnings of these companies all was German, and, specifically, all was I. G. Farben. Petitioner was organized by Greutert-Sturzenegger for I. G. Farben, and its assets came from I. G. Farben. The Greutert firm was maintained by Farben's deposits and owned by a Farben company. American I. G. Chemical Co., later called General Aniline & Film Corporation, was sponsored by Farben and Farben operated its business (R. 64–6, 88–92, 211, 213, 248, 268–9, 1277–9, 1860–3; *supra,* pp. 30–2, 46). If peti-

tioner is now as Swiss as it must be to maintain this suit, a drastic reformation must have taken place, and this is petitioner's claim. But if it wishes an American court to uphold this claim, that court must have access to all the pertinent facts—and without such facts, there is lacking any basis on which petitioner can ask for judgment in its favor.

In 1931, petitioner's counsel says, the Sturzenegger Circle "began to acquire" the principal interests in the Greutert firm, "perhaps in connection with some German influence." Increasingly, he says, the real ownership of Greutert-Sturzenegger and the Circle passed to a Circle composed only of Swiss companies and individuals. The end result, he claims, is that the Circle "changed internal complexion" and the ownership of Greutert-Sturzenegger "reformed" (R. 64–6, 88–90).

Where did the money come from? In the words of the Swiss Compensation Office, "Where did the Swiss group obtain the funds to acquire the decisive parcels of shares?" (R. 224).

The Custodian's belief is that the money came from I. G. Farben and still is the money of I. G. Farben. Thus, it appears that when Visca bought 98% ownership of Greutert-Sturzenegger in 1931 (*supra*, p. 31), a secretariat on Greutert's books bought Visca (R. 269–71, 1274–7). Farben's assets were admittedly held in that secretariat (R. 1277–8), and payment was made in shares in petitioner last previously heard from as subscribed by I. G. Farben (R. 211–3, 1274–6, 1518–9). Moreover, Industriebank, successor to Visca as owner of Greutert-Sturzenegger,

was bought and paid for in 1931 by Greutert-Sturzenegger (or a secretariat) with more of the same Farben-subscribed stock (R. 281–2, 1518–20, 1284–8, 1293–6).

Industriebank was bought for sfrs. 12,000,000, yet five years later it was sold to Circle individuals for sfrs. 3,000,000 (R. 281–6, 1294–5). The insiders got not only a drastically reduced price, but Visca put up the money with which they bought. Visca, it is also to be noted, apparently held substantial sums of money for the ostensible purpose of satisfying pension obligations owed the "leading men" of Greutert (R. 281–90). But there is evidence that Visca, through a subsidiary, held pension monies for the leading men of Farben (R. 1718–20, 1281–4).

Greutert-Sturzenegger, or one of its subsidiaries or secretariats, was a party to each of the transactions by which the Circle is said to have changed from German to Swiss. Our view of where the money came from thus points only to the necessity of examining the Sturzenegger books.

The Swiss Compensation Office answers its question as to the source of the money somewhat differently, but its answer, too—and this is the decisive fact here—is one whose truth can only be determined in the Sturzenegger books. The Swiss Office maintains that the money came from profits made by the insiders of the Greutert-Sturzenegger firm in the course of doing Farben's business. The Office states that "Greutert & Co., thanks to their relationship with I. G. Farben, were able to make considerable profits". Also, that "interesting business transactions", apart

from "ordinary bank transactions", were passed through various secretariat and consortium accounts "without their appearing in the profit and loss account" of the bank. Between 1930 and 1937, these transactions yielded a profit of sfrs. 120,000,000, or roughly $30,000,000, which was in large part credited to Chemie, the Greutert firm, and "affiliated concerns". In conclusion, the Swiss Compensation Office states that "[i]n view of these tremendous profits, it is understandable that the leading lights in Greutert & Co. received special compensations in the form of securities and credits. For example, a parcel of Visca shares was given gratis to Mr. Mollwo and Mr. Greutert in September 1934. Later on, these shares were exchanged for Perpetua shares when the Visca was liquidated" (R. 224–5, 295–6, 300).

The Swiss Office finds nothing odd in this version. "These special payments, in proportion to the profits and the transactions arranged, do not appear to be extraordinary" (R. 225).

Extraordinary or not, on behalf of Farben or not, the truth as to where the Swiss got the money to buy out the Germans is admittedly to be found in the Sturzenegger records of the "considerable profits" which were made by the Swiss "thanks to their relationship with I. G. Farben". Without these records, the court is deprived of the facts on which it can in good conscience decide the issues raised by the complaint. And a plaintiff can win judgment only if he prevails on *all* the facts, and not on a partial, incomplete, and perhaps misleading presentation of the relevant facts.

There is good reason to believe, contrary to the view of the Swiss Compensation Office, that all here was not so innocent of Farben taint. It is at least unusual that the servant buys out his principal, especially with profits earned by the use of the principal's money. For the "leading lights" who received these "special compensations" were no more than servants. Mollwo, who received "gratis" a parcel of shares in Visca, was a clerk in Greutert-Sturzenegger (R. 67, 224–5, 269, 1838–42; *supra*, p. 36). Others who were stockholders in the Circle were also clerks in the Greutert firm [35] and those who were not were Mr. Greutert's close friends (*supra*, pp. 36–7). That they did not own this Circle stock in their own right is suggested both by the options, pledges and loans with which their title was restricted (*supra*, p. 37) and by the evidence that several of them customarily acted as cloaks for I. G. Farben.[36]

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[35] Greutert, ostensibly the unlimited partner in his firm, started with a salary of 30,000 marks per annum and insisted upon a guaranty limiting his liability in Greutert & Cie. to sfrs. 50,000, his total investment (R. 63, 268–9, 1834–9). Sturzenegger, Haller, Werder, Sutter and Germann, other Circle stockholders, were also clerks (R. 67–9, 691–3, 1342–3, 1347–9, 1836–42; *supra*, p. 36).

[36] Mollwo, stockholder in three Circle companies, Industriebank, Rigidor, and Sopadep (R. 283, 286–8), held stock in the Greutert firm for Visca, itself a cloak for Farben (R. 67, 269; *supra*, p. 31). For Farben, more directly, he held interests in companies in Holland and Hungary (R. 316–8, 1140–2, 1169–73). Auer, a stockholder in Rigidor, was in 1940 enlisted to act as cloak for Farben's South American companies upon Mr. Sturzenegger's recommendation (R. 287, 318–20, 862–3, 8 9). And Grieshaber, a Perpetua stockholder, cloaked Farben's ownership of companies in British

The Custodian is of the belief, with Rudolf Euler, that the Greutert firm was a "tube" into which Farben money went, coming out on the other side "to some other firm connected with I. G." (*supra*, p. 5), and that this was the case with the Circle. Even Mr. Sturzenegger has admitted that the "great balances" kept by Farben with his firm were "mostly applied" to credits for other firms "connected with I. G. Farben", but he limits the time to the pre-war period (R. 1278–9). Whether the Greutert-Sturzenegger firm was such a tube in its performance of the "interesting business transactions" whose profits paid for the change in character of the Circle can be determined only by study of the Sturzenegger records. Only those records can show whether the monies used to substitute Swiss for German ownership of the Circle were not in truth caches of Farben money—a crucial issue in this litigation, and one on which petitioner had the burden of proof if it wished judgment.

The Trading with the Enemy Act is directly aimed at uncovering such caches of concealed enemy assets. In the light of the facts showing the significance of the Sturzenegger records, the Act requires that all the records be produced; otherwise, the issues cannot be determined. Concealment of German property interests reached a high point, in extent and complexity, in the period before World War II. By the time the United States entered World War II, it had become

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India. He was recommended for this work by Mr. Greutert or Mr. Sturzenegger (R. 1080–2, 1138–9). Mr. Greutert, and Mr. Sturzenegger after him, cloaked Farben interests in Greece and Rumania (*supra*, p. 45).

"notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership or control of property which was ostensibly friendly or neutral". On the declaration of war, therefore, Congress broadened the Act "to reach enemy interests which masqueraded under those innocent fronts". *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 484–5. Of special concern were "tangled mazes of holding companies * * * incorporated in neutral countries". *Id.*, at 485, n. 3, quoting from *Administration of the Wartime Financial and Property Controls of the United States Government*, Treasury Dept. (1942), pp. 29–30. See *Hearings on Elimination of German Resources for War before a Subcommittee of the Senate Committee on Military Affairs Pursuant to S. Res. 107 and S. Res. 146*, 79th Cong., 1st Sess., 49, 52, 68–9, 564–85, 969–77, 1063, 1203–21 (1945); H. Rep. No. 2398, 79th Cong., 2d Sess., 3 (1946).

The present-day Trading with the Enemy Act[37] is thus deliberately directed at the penetration of every guise for the concealment of interests inimical to the United States. The courts have therefore most strictly required disclosure of the facts of enemy taint concealed beneath the surface of apparent friendly ownership. *Uebersee Finanz-Korp.* v. *Mc-*

[37] The Act, effective in time of war and declared emergency (Section 5 (b), *infra*, p. 86), is presently the basis for regulations applicable to mainland China, North Korea and countries of Eastern Europe. Proclamation No. 2914, Dec. 16, 1950, 15 Fed. Reg. 9029, 64 Stat. A454; 31 C. F. R. 500.101–808, 15 Fed. Reg. 9040, Dec. 19, 1950; 31 C. F. R. 505.01–60, 18 Fed. Reg. 4291, July 23, 1953; cf. 31 C. F. R. 510.201–801, 21 Fed. Reg. 5777, Aug. 2, 1956.

Grath, 343 U. S. 205, 210–2; *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 923 (C. A. 2), certiorari denied, 333 U. S. 873; *Vort* v. *McGrath*, 99 F. Supp. 57 (D. D. C.), affirmed, 199 F. 2d 782 (C. A. D. C.), certiorari denied, 345 U. S. 911; *Kaname Fujino* v. *Clark*, 71 F. Supp. 1, 4 (D. Hawaii), affirmed, 172 F. 2d 384 (C. A. 9), certiorari denied, 337 U. S. 937.

The courts below are thus supported by the governing Act in their insistence upon full, rather than partial, disclosure of the Sturzenegger records. A trial without production of these records would mean frustration of the Act. Beyond that, it would not be a trial in the American sense, in which judgment is rendered on *all* the facts relevant and material to the issues presented. Without such facts, a trial cannot serve the ends of justice.

III

THE EXCUSE OF SWISS LAW FOR NONCOMPLIANCE WAS CORRECTLY REJECTED, AND THE COURT PROPERLY DISMISSED THE COMPLAINT FOR REFUSAL TO PRODUCE ESSENTIAL PAPERS

In the light of the evidence that Sturzenegger & Cie. is the *alter ego* of the petitioner and that the Sturzenegger records are indispensable, the district court dismissed the complaint. It did so in the interest of protecting discovery as a vital tool for developing the truth about issues crucial to a decision on a party's complaint. The court held that it was due process both to seek to elicit the truth by requiring the production of essential records and to dismiss the complaint for lack of such production. Both

courts below agreed in rejecting the validity, for purposes of American law, of the excuse offered for noncompliance, *i. e.*, that the Swiss order and secrecy laws prohibited the discovery of the records (R. 2041–3, 619–20, 625–6).

The Swiss bank secrecy law gives a privilege to a banker to keep secret the facts of his client's activities, and the Swiss law of "economic espionage" suppresses the "business secrets" of private persons and prevents even voluntary disclosure except in the discretion of the Swiss Government (R. 537–42, 753–5).

These secrecy laws and the order enforcing them were properly rejected as excuses for nonproduction, first, because the laws are applied or not by the Swiss Government as a matter of discretion and are therefore not properly to be accepted as laws of uniform application; and, second, because, in any event, a secrecy imposed by foreign laws cannot prevail over the contrary law of the forum, whose procedural law imposes a general duty to make discovery and whose substantive law (the Trading with the Enemy Act) requires the fullest disclosure of the facts bearing on enemy taint and enemy ownership.

A. THE SWISS LAWS ARE NOT UNIFORMLY APPLIED

Petitioner and Mr. Sturzenegger have repeatedly drawn upon the Sturzenegger records and, without hindrance, have disclosed the "secrets" of others contained therein. For instance, in support of an application for a United States Treasury license in 1940, petitioner procured from Sturzenegger and sub-

mitted a group of letters exchanged between the Sturzenegger firm and a group of Dutch companies, revealing, of course, the business secrets of the latter (R. 748–51, 739–43).

Again, in a joint application in 1949 to the Allied military authorities in Berlin for the release of their majority stock interest in the Deutsche Laenderbank in Berlin, petitioner and Sturzenegger jointly submitted copies of some 50 documents from the Sturzenegger files, including customers' accounts and pages from the journal. These documents disclosed the "secrets" of some 17 persons (R. 68, 100–1, 1101–5, 715–7, 743–6, 1603–16).

A third instance involves the claim filed with the Alien Property Custodian for return of the property in suit (R. 1728–1809), a statutory prerequisite to this suit under Section 9 (a) of the Act. Petitioner admittedly could not itself show a chain of title to the vested property. In order to fill in the gaps, it obtained from the Sturzenegger firm over twenty of the forty-seven documents which it attached to its claim. It thereby revealed the secrets of American, Dutch and Swiss companies, admittedly without any thought to the prohibitions of the Swiss secrecy laws (R. 697–9, 704, *supra*, p. 44).

None of these disclosures of the secrets of others was the subject of action, before or after the event, by Swiss authorities. The disclosures in the claim filed in this case were fully known to the Swiss Government, for it transmitted petitioner's claim, with the

documents attached, to the Department of State to identify property whose return it was requesting.[38]

Other instances of disregard for the Swiss secrecy laws occurred in the course of deposition testimony by Mr. Hans Sturzenegger, who, for his own purposes, dramatically initiated a departure from secrecy. The occasion was his examination by Government counsel on documents obtained in Germany, indicating that during World War II he received a request from Berlin, through the German Consul in Basle, to transfer a large sum of money to Spain to help finance German purchases of tin. Petitioner's counsel thereupon telephoned Switzerland to secure additional information from the Sturzenegger records. On the very next day, Mr. Sturzenegger disclosed a series of facts from these records "in order to rebut and overcome and explain." The secrets thus disclosed included those of a German client of the Sturzenegger firm, of a group of Swiss, Spanish and Portuguese banks, and of the Swiss National Bank and the Deutsche Reichsbank (R. 85, 93–5, 871–9). Chief Judge Laws has commented that "I don't think the laws of a foreign country could be such that one side can get them [the papers], and that is the Swiss corporation, and the other side can't" (R. 74).[39] He further characterized

[38] The Swiss Government's note is not in the record, but the response of the Department of State, rejecting the demand for the return of the vested property, does appear (R. 563–6).

[39] At another time, he expressed his view that "[w]e do not want to give one litigant any advantage over another with regard to documents from the plaintiff corporation itself" (MS. R. 89).

the situation presented by the Swiss order prohibiting discovery as follows (R. 108):

> The effect of it from our point of view is, the Swiss Government lets you [petitioner's counsel] have some of them that you can offer in evidence but conceivably there are any number of others there that might be helpful to the other side. Now, the Swiss Government stops us.

The discretionary element in the administration of these Swiss laws is such that they may be waived, the waiver retracted, and then the retraction overcome.[40] At the outset of his testimony, Mr. Sturzenegger had waived the secrecy laws as to some 75 persons, including I. G. Farben, on the ground of their involvement in the case (R. 821–61). Thereafter, when specific questions were asked about his wartime dealings with Farben, he retracted the waiver of secrecy and refused to answer on the ground that he would risk sentence of imprisonment under the Swiss secrecy laws (R. 56–61, 944–50, 953–7). He was then ordered to answer by the court, and he did so. He apparently suffered no consequences from either his voluntary or his enforced disregard of the secrecy laws (R. 61–2, 356, 957–1078).

Although the United States, appearing as a defendant in its own courts, has been unable, over a course of many years, to secure discovery of the Sturzenegger records, the Swiss Compensation Office encountered

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[40] Compare the incident in which Swiss authorities, having for years refused to permit American depositions to be taken in Switzerland, made an exception, at the request of petitioner, for Mr. Sturzenegger's deposition (*supra*, pp. 6–7).

no obstacles. When it undertook its investigation of the same questions which are at issue in this case, it got full and immediate access to all records of petitioner and Sturzenegger & Cie. (*supra*, pp. 7–9, 15).

The court of appeals noted without criticism that, in issuing its order, the Government of Switzerland acted "in her own wisdom, upon consideration no doubt of many factors" (R. 2041). All of the factors need not be known, however, for the conclusion to be drawn that the Swiss order does not represent the application of a uniform rule of law, but, rather, an executive or administrative decision made in the exercise of an apparently unfettered discretion. The exercise of that discretion in this case was, as the court of appeals noted, "explicitly designed to prevent [the] production" (R. 2040).[41] In these circumstances, the Swiss order may not be allowed to relieve petitioner, a Swiss plaintiff, of obligations imposed on all plaintiffs suing in the American courts, to prejudice the rights of the United States as the defendant in this case, and to require an American federal court to conduct, in effect, a "half-trial" in which some, but not all, of the pertinent facts are presented.

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[41] The prohibition of production by the Swiss Federal Attorney came after petitioner had failed in repeated attempts to persuade the district court to withdraw its order, and on the eve of actual discovery (*supra*, pp. 11–12). The court of appeals pointed out that the Swiss Federal Attorney has stated that the district court's order for discovery was "exactly what gave rise at that time to the issue of [his] order" (R. 754, 2040). The order was directed exclusively at the Sturzenegger records, defining them as those "ordered to be produced by the American Judge" (R. 436, 754).

B. THE SWISS LAWS MAY NOT IN ANY EVENT PREVAIL OVER THE CONTRARY LAW OF THE FORUM.

Even aside from the lack of uniform application, the Swiss laws (and the order issued thereunder) are not a valid excuse for nonproduction because it is the law of the forum which governs such matters as the obligation to produce documents.

Before the Federal Attorney's order was issued, Mr. Sturzenegger twice declared that the Swiss secrecy laws prevented him from complying with the court's order for production (*supra*, pp. 10–11). What, then, did the order add or what change did it work? Both courts below noted that the records were not taken or destroyed by the order; it took only constructive possession of the records, "by interdiction" (R. 608, 623, 2037, 2040, n. 14). The order added to the existing situation only an explicit threat of prosecution, an *in personam* prohibition in execution of the secrecy laws. While it served to support petitioner's and Mr. Sturzenegger's arguments that compliance with the American court's order might lead to prosecution under Swiss laws, those Swiss laws were in effect before as well as after the issuance of the order. Demonstration that the order added to the existing laws only a threat of prosecution is to be found in the effect worked by the withdrawal of the Swiss order in October 1956 (*supra*, p. 23, n. 11), when the Swiss authorities believed that the case in our courts was closed. Petitioner claims that, despite the withdrawal of the order, the underlying law still forbids Sturzenegger to produce the records (R. 2052–5).

The Swiss order is therefore to be treated as a threat of criminal prosecution under foreign laws proscribing the disclosure of information. It is settled, however, that the danger of prosecution under a foreign law is no plea to an order to testify or to produce documents. In *King of the Two Sicilies* v. *Willcox*, 7 St. Tr. (N. S.) 1049, 1068–70 (1850), production of documents in response to an order of the Court of Chancery was refused by defendants on the ground that disclosure would subject them to criminal prosecution in Sicily. The plea was rejected by the court, which held that "the rule of protection is confined to what may tend to subject a party to penalties by our own laws * * *." The case has been generally followed in this country, in this and other courts. *E. g., Hale* v. *Henkel*, 201 U. S. 43, 69; *United States* v. *Murdock*, 284 U. S. 141, 149; *Republic of Greece* v. *Koukouras*, 264 Mass. 318, 162 N. E. 345. It was followed by District Judge Bailey, in this case, in ordering Mr. Sturzenegger to answer questions, despite the claim that he would, by answering, incur the criminal sanctions of the Swiss secrecy laws (*supra*, p. 10). In a recent ruling in an antitrust case, the District Court for the Southern District of New York (*per* Walsh, *J.*) similarly rejected a plea based on the Swiss secrecy laws and ruled that defendants were required to answer fully interrogatories propounded by the United States as plaintiff. *United States* v. *Watchmakers of Switzerland, et al.*, Civ. 96–170, S. D. N. Y., February 19, 1957.

The secrecy laws on which the threat of prosecution was based are as unavailing as the threat itself

to excuse the failure to make discovery; this for the fundamental reason that they are in direct conflict with our law. The Swiss secrecy laws suppress the Sturzenegger records. By our law, petitioner has a duty to produce them. Discovery procedures are "applicable generally to litigants under the law of the forum," the court of appeals pointed out, as a "means of arriving at the truth of the substantive issues in the litigation" (R. 2041). "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Hickman* v. *Taylor*, 329 U. S. 495, 507. The records in question are those of petitioner's *alter ego*, and they contain evidence of such great importance on the issues raised by the pleadings and the provisions of the Trading With the Enemy Act that their suppression might give petitioner "decisive advantage" (R. 2040). The duty to produce, imposed by the law of the forum, is thus based doubly on general discovery procedures and on the governing substantive statute.

The conflict between the foreign secrecy laws and the law of the forum can be resolved only in favor of the latter. It is axiomatic that matters of procedure are governed by the law of the forum. *Dixon's Executors* v. *Ramsay's Executors*, 3 Cranch 319, 324; *De La Vega* v. *Vianna*, 1 B. & Ad. 284, 288, 109 Eng. Rep. 792, 793 (K. B., 1830); *Don* v. *Lippmann*, 5 Cl. & Fin. 1, 7 Eng. Rep. 303 (H. L., 1837); 3 Beale, *Conflict of Laws* (1935), 1600. "A person suing in this country must take the law as he finds it; he can-

not, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here * * *." *De La Vega* v. *Vianna, supra.* This rule is ancient law and is followed universally, in Switzerland no less than elsewhere. Nussbaum, *American-Swiss Private International Law,* 47 Col. L. Rev. 186, 189 (1947).[42]

Privileges and secrecies, as matters pertaining to evidence, are governed by the law of the forum. *Pritchard* v. *Norton,* 106 U. S. 124, 133–4; *Russell* v. *Barnes Foundation,* 143 F. 2d 871 (C. A. 3), certiorari denied, 323 U. S. 771. By our law, the public has a right to every man's evidence, and privilege is an exception to the general rule. *United States* v. *Bryan,* 339 U. S. 323, 331. The American law recognizes no such privilege as the Swiss secrecy laws create for "economic" information and for the confidences lodged by a client with his banker. *Interstate Commerce Commission* v. *Harriman,* 157 Fed. 432 (C. C., S. D. N. Y.), affirmed in part, reversed in part, on other grounds, 211 U. S. 407; *Bowles* v. *Shawano Nat. Bank,* 151 F. 2d 749 (C. A. 7), certiorari denied, 327 U. S. 781; 8 Wigmore, *Evidence,* (3d ed. 1940) Section 2286; Limburg, *The Bankers' and the Brokers' Privilege,* 25 Col. L. Rev. 152 (1925),

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[42] Thus, a German court has held that a Swiss plaintiff who "conducts a lawsuit abroad must comply with the rules of evidence of that country. For instance, if, according to the civil procedure of a country, an oath is odered, the party cannot claim that in the country of its nationality or domicile the taking of the oath is not known. If it refuses the taking of the oath, the party must bear the legal consequences." Schnitzer, *2 Handbuch des Internationalen Privatrechts* (Basel, 1944) 656 (Translation).

Cf. *McMann v. Securities and Exchange Commission*, 87 F. 2d 377 (C. A. 2), certiorari denied, 301 U. S. 684. Accordingly, no foreign privilege of this character may be invoked, for privileges not recognized in the law of the forum may not be pleaded: *Doll* v. *Equitable Life Assurance Soc.*, 138 Fed. 705, 710 (C. A. 3); *Humphries* v. *Pennsylvania R. Co.*, 14 F. R. D. 177 (N. D. Ohio); *Panella* v. *Baltimore & O. R. Co.*, 14 F. R. D. 196, 197 (N. D. Ohio). "The obligation of parties to produce papers, and even to submit to an examination, is to be determined by the law of the court of examination * * *." 2 Wharton, *Conflict of Laws* (3d ed. 1905) Section 729. In *King of Spain* v. *Hullett*, 7 Bligh N. S. 359, 392–3, 5 Eng. Rep. 808, 820 (H. L., 1833), the Lord Chancellor said, "The right of the King of Spain in respect of privilege in the courts of England, is not greater than that of any of his subjects. If he can bring his privilege with him, why may not his subjects also? One objects to answer upon oath; another may object to a trial by a jury of tradesmen. But if the king is recognized in the character of a suitor, must he not be content with the common fare of the court?"

Even if the Swiss Government were itself a party, it would be governed by the law of the forum and required to make discovery or suffer its complaint to be dismissed. *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134 n. 2; *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746, 753 (C. A. 2); *Republic of Liberia* v. *Roye*, 1 App. Cas. 139, 143 (H. L., 1876); *King of Spain* v. *Hullett*, *supra*; *Rothschild* v. *Queen of Portugal*, 3 Y. & C. Ex. 594,

160 Eng. Rep. 838 (Exch. 1839); *Prioleau* v. *United States and Andrew Johnson*, L. R. 2 Eq. 659 (1866). It cannot, by its laws, better the position of its national, over itself and all other claimants, especially when to do so would seriously prejudice the administration of justice to the opposing party. Cf. *National Bank* v. *Republic of China*, 348 U. S. 356. The principle, then, is that the law of the forum must prevail over the foreign law in such matters as the obligation to produce documents and the privileges of secrecy. The district court found it "obvious that foreign law cannot be permitted to obstruct the investigation and discovery of facts in a case, established as conducive to the proper and orderly administration of justice in a Court of the United States" (R. 619–20).

This principle, generally applicable to all cases, was held reinforced, in its application to the instant case, by the substantive (indeed, jurisdictional) provisions of the Trading with the Enemy Act.[43] Foreign secrecy laws, particularly where as here they are in-

[43] The Act, in Section 9 (a), gives the consent of the United States to be sued, but only by persons who are not enemies and only for such interests as they may own. The conditions imposed on suits must be strictly met. *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591. The United States cannot be said to have consented, in the Act, to a suit in which foreign secrecy laws would deprive the court and the defendant of evidence decisive on the jurisdictional issues of enemy character and enemy ownership. Cf. *United States* v. *Reynolds*, 345 U. S. 1, 6, 12. The United States is entitled to compliance with the general law of discovery, as a party litigant, and to compliance with the conditions it has imposed on suits under the Trading with the Enemy Act.

voked to suppress the facts which bear on enemy taint, are anathema to the Trading with the Enemy Act. The Act was expressly designed by Congress to pierce the techniques and guises for concealing enemy interests. The courts are to penetrate as deeply as is necessary to learn the full facts of the neutral plaintiff's claim of "innocent" ownership (*supra*, pp. 54–6). A trial without the Sturzenegger records might, the district court said, "defeat the purposes of the Trading With the Enemy Act by permitting a foreign national to bring suit in this country to recover property seized under the Act and then seek shelter under the protective cloak of its government when discovery is sought" (R. 620, 2039–41). The court of appeals agreed that the district court was entitled to insist that "if the trial is to go forward it shall do so in accordance with accepted procedures for developing the truth about contested factual issues raised by [petitioner], the ultimate objective of the trial" (R. 2041–2).

The very same problem has been presented to the English courts—in cases of captures at sea under prize law, noted by the district court to be historically close to the law of captures on land embodied in the Trading With the Enemy Act (R. 621)[44]—and there decided in the same fashion. In World War I, British vessels had seized various Swedish cargoes as contraband destined to Germany. The Swedish

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[44] See, also, Judge Learned Hand's opinion in *Stoehr* v. *Wallace*, 269 Fed. 827, 840 (S. D. N. Y.), affirmed, 255 U. S. 239.

law, strikingly similar to the Swiss laws here involved, made it unlawful to disclose information on commercial transactions. Nonetheless, the several English courts, including the Privy Council, entered orders that the Swedish claimants make discovery as to the true ownership and destination of the cargo. The Swedish law was held no excuse for nonperformance of the duty to make discovery, and the failure to obey the orders of discovery was held to require the dismissal of the claims. *Kronprinsessan Margareta,* Lloyd's List, October 31, 1917, 6 Lloyd's Prize Cases 105, n. (1917); *Steamship "Antilla" and Other Vessels,* 7 Lloyd's Prize Cases 401 (1918); see, also, *The Consul Corfitzon,* [1917] A. C. 550, 555; *The Baron Stjernblad,* [1918] A. C. 173, 178, 179; *The Kronprinzessin Victoria,* [1919] A. C. 261, 267–8.[45]

In *The Consul Corfitzon,* the Privy Council, affirming an order for discovery despite the claim that com-

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[45] A comparable ruling was made in the Court of Chancery in 1944 on a claim for extension of a patent, where claimant pleaded that the Swedish law prevented his disclosure of facts relevant to support a claim for an extension of a patent. *Re Von Kantzow's Patent* (1944), Ch. 318. Lord Simonds wrote that (at p. 321):

> It appears to me that this court, having placed on it the delicate task of determining whether its discretionary jurisdiction should be exercised in favour of an applicant in a matter in which the public interest also is concerned, must be told all the relevant facts. If an applicant is the subject of a foreign State and is precluded by his municipal law from giving the necessary information to the court, that is his misfortune.

pliance would be a crime under Swedish law, held that "a Court of Prize cannot properly be deterred from making what it conceives to be the appropriate order, because the neutral claimant would, if he obeyed the order, be guilty of a breach of his own municipal law" ([1917] A. C. at 555). *Kronprinsessan Margareta* and *The Antilla* closely parallel the situation presented in the instant case. The Swedish Government had refused to permit the claimant to comply with the order for discovery and the court dismissed the claims. In the latter case, partial discovery had been made; a request to try the case on the available evidence was refused. In *The Baron Stjernblad*, the Privy Council, recalling its affirmance of the dismissal in *Kronprinsessan Margareta*, noted that the neutral claimant must either violate his own law or violate the order of the court "and so lose his case." "The position is anomalous but the anomaly is certainly not due to any defect in the practice of the Prize Court or in the law which it administers" [1918] A. C. 173, 178, 179. The Privy Council held, further, that "a neutral cargo owner would appear to be quite as responsible for the actions of his own Government as he is for the action of the master or crew of the vessel on which the cargo is shipped" (*id.*, at 180). Reinforced by this line of authority, the courts below joined in rejecting the excuses of foreign law offered by petitioner for its failure to comply with discovery procedures.

The court of appeals also agreed with the district court that to go to trial without the papers, and postpone decision until then, would be unsatisfactory (R.

2045–6). Putting aside the unfairness stemming from the fact that petitioner already had the benefit of full discovery of all information known to the Custodian, trial would be no solution because the Sturzenegger records would still be missing at the conclusion of the trial; and the same decision on the necessity of production would be inevitable. The nature of these records and of the relationship between petitioner and Sturzenegger & Cie. is such, as both courts found, that a knowing decision on the issues, or any decision in favor of the petitioner, would be possible only on the basis of full production of the records. There is no substitute, either in secondary or other evidence, for the demonstrated contents of the Sturzenegger records. For instance, the very German or neutral ownership of the stock in issue can be shown decisively only by those records (*supra*, pp. 44–5). Nowhere else but in these records is to be found the evidence on the administration of the assets of petitioner, or the evidence of the German or Swiss character of the Circle that controls petitioner (*supra*, pp. 48–53).

As the court of appeals noted, the Custodian could not be expected to prove definitively that without these records he would certainly fail in his defense. Such proof is hypothetical and impossible. It is sufficient to show, as we have, that there is exceedingly good reason to believe that decisive evidence is contained in the missing records. In such circumstances, we submit that the consequences for the Custodian of a trial without full reciprocal production would be manifestly unjust (R. 2040–1, 106–8, 131–2, 617, 625–6).

The same conclusion can be phrased in terms of the consent of the United States to suit, as expressed in the Trading with the Enemy Act. A neutral suitor may not bring suit, except with full disclosure on the issues of its enemy taint and the enemy ownership of the property it seeks.

One or the other party must be adversely affected, however the Court resolves the impasse brought about by the Swiss secrecy laws. Dismissal of the complaint is, of course, the end to petitioner's claim in the courts. Trial without the records, on the other hand, would not be a trial in the American sense, and it would mean a denial of the right to defend. As between these two, the choice is clear, in view of the double emphasis in the law of the forum on the disclosure of the facts contained in the Sturzenegger records. The onus must fall upon petitioner and the complaint be dismissed. The courts below properly concluded that since petitioner's government created the inability to make discovery, it is reasonable to leave the disadvantage where the American law places it, on that government's national (R. 2045, 620, 107–8; MS. R. 1322–8).

Petitioner may have recourse against its government. "It has the right to look to its government for espousal of its cause against the United States." *United States* v. *Diekelman*, 92 U. S. 520, 524. Indeed, it will be the beneficiary of any success in the Swiss Government's separate suit, in the International

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[46] It has, in fact, received its Government's continuing support in this litigation (R. 232, 419, 559–72, 449, 181–9).

Court of Justice, for release of the property in issue.[47] But a foreign plaintiff may not obtain, on the basis of the laws or administrative decisions of its own government, a preference in the courts of the United States over all other litigants who avail themselves of our courts, and require an American court to conduct a "trial" in name only, where crucial records are known to exist and yet are beyond the court's reach. This conclusion has particular force in the context of this case, for in this litigation the preference sought would seriously prejudice the right of the United States (which, incidentally, has made full production) to defend the suit and it would open an avenue for frustration of the objects of the Trading With the Enemy Act. The court of appeals rightly held that due process of law does not require that such "[h]andicap in the conduct, and risk in the outcome, of litigation, due to the absence of evidence reasonably determined on the basis of available information to be relevant and material" be cast upon the defendant (R. 2041).

IV

THE DISTRICT COURT HAD THE POWER TO ORDER DISMISSAL

The district court had ample power to order dismissal of petitioner's complaint. We rely upon three

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[47] See *Interhandel Case* (*Switzerland* v. *United States of America*), order of October 24, 1957, I. C. J. Reports 1957, p. 105. In these international proceedings, the United States maintains that the rules under which petitioner's complaint was dismissed by the courts below "are in compliance with the standards of international law for a fair hearing." 36 Dept. of State Bull. 350, 352 (1957).

separate sources of authority—Rule 37 (b) of the Federal Rules of Civil Procedure (Appendix, *infra*, pp. 91–2); the inherent powers of federal courts to make orders for the proper conduct of a suit, including orders for discovery, and to dismiss a complaint for an inexcusable failure to comply with such orders; and the powers specifically conferred on the court by Section 17 of the Trading With the Enemy Act (*id.*, p. 89).

A. Rule 37 (b) (2) provides:

> (b) Failure to Comply with Order
>
> (1) *Contempt.* * * *
>
> (2) *Other Consequences.* If any party * * * refuses to obey * * * an order made under Rule 34 to produce any document * * * the court may make such orders in regard to the refusal as are just, and among others the following:
>
> * * * * * *
>
> (iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> * * * * * *

Petitioner's failure to produce the records ordered to be produced became a "refusal" to which the consequences stated in Rule 37 (b) could attach, to the extent "just," on the rejection of the Swiss laws and order as an excuse for the noncompliance. The court found that, with the records in its control, petitioner had "refused" or "declined" to produce them as ordered (R. 623). If the courts below acted

properly in rejecting Swiss law as an excuse for non-compliance, the dismissal was "just" under the Rule, consistent with due process, and authorized by Rule 37 (b).

Commonly, when a proffered excuse or justification for failure to obey a statutory direction or other order is held insufficient, the party subject to the order is treated as one who has refused to obey the direction or order. Even where the statute specifies that the refusal or disobedience be wilful, it may be sufficient to show that it was done without justifiable excuse. *Cf. Heikkinen* v. *United States*, No. 89, this Term, decided January 6, 1958, slip opinion, p. 6; *United States* v. *Murdock*, 290 U. S. 389, 394. Here, it should be noted, wilfulness is not stated as a prerequisite to the making of any of the orders specified in Rule 37 (b), although it is explicitly required for the attachment of the consequences provided in another subdivision of Rule 37, subdivision (d) (dealing with orders appropriate where a party "wilfully fails" to appear for a deposition). Accordingly, the refusal need not be wilful in order to authorize the imposition of the consequences provided for a refusal. *Cf. United States* v. *Murdock, supra*, at p. 397; *Sinclair* v. *United States*, 279 U. S. 263, 299.

Rule 37 (b), according to its caption, deals with "Failure to Comply with Order." The text of paragraph (2), quoted above, simply provides that where a party "refuses to obey" the court may make such orders in regard to the "refusal" as are "just," among them an order staying proceedings until the order is

"obeyed," or dismissing the action, or giving judgment by default against the "disobedient" party. The word "refusal" is used in the caption of the entire Rule ("Refusal to Make Discovery; Consequences"). The caption of subdivision (b), on the other hand, refers to "failure" ("Failure to Comply with Order"). And the text of subdivision (b) again uses the words "refusal" and "refuses." It can be seen from these captions and the text that "refusal" and "failure" are used interchangeably. None of the relevant words used in text or caption—"refusal," "failure" or "disobedience"—necessarily connotes wilfulness. "Refusal" means only declination or denial of something demanded, and failure and disobedience mean only a deficiency or omission to perform. See Webster's *New International Dictionary* (2d ed., unabridged), pp. 750, 910, 2095.

The disobedience which permits exercise of the powers conferred by the Rule is described in neutral terms. In our view, the powers granted by the Rule became operative whenever an order for the production of papers is not obeyed, without excuse or without acceptable excuse. The adjustment of consequences to type and circumstances of disobedience—whether wilful or in good faith, irremediably prejudicial to the other party or otherwise—is achieved by granting to the court the power to make only such orders "as are just." The court is not denied the power to make an order, of dismissal or otherwise, by reason of a lack of wilfulness or any other single factor. Rather, it is generally denied the power to make any order which is unjust. The power to make an

order staying proceedings or dismissing the complaint is thus to be determined by reference to the justice or propriety of the exercise of the power in the particular case. A just order, in the interests of due process, is necessarily within the power of the court. The court of appeals, though it preferred to rest its conclusion of power to dismiss on grounds other than Rule 37 (b),[48] agreed that, no matter what the source of the power, the question was the propriety or justice of its exercise. "In the end," it said, "the question [of power to dismiss] turns upon whether the particular exercise of the power to dismiss with prejudice is consistent with due process of law" (R. 2039). Cf. *Jones* v. *Union Guano Co.*, 264 U. S. 171, 180–181; *National Union* v. *Arnold*, 348 U. S. 37, 45.

We believe our analysis of Rule 37 (b) to be consistent with its history and with this Court's view of its predecessors. Bare power to dismiss, as distinguished from propriety of the exercise of the power, was no problem either before or after the adoption of the Federal Rules. This Court has noted that the power to dismiss for disobedience of orders of discovery was first conferred on the federal courts by Section 15 of the first Judiciary Act, in 1789, and that not since then has the power been questioned. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322,

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[48] The court of appeals suggested that Rule 37 (b) may not have been written for the case where a foreign government disables its national, without fault of the national, from making discovery of records of decisive importance (R. 2038–9). It held that power to dismiss was found in the inherent powers of a court, confirmed in Rule 41 (b) (*infra*, p. 93).

351–3. Even where an order of dismissal had been invalidated for want of power, the Court explained, it was not for any "especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play" in such manner as to deny due process (*id.*, at 350). The *Hammond* case was much in the minds of the framers of Rule 37 (Committee Note, 28 U. S. C. (1952 ed.) foll. Sec. 2072), and the distinction made in *Hammond* between the power to dismiss and the propriety of the exercise of the power doubtless accounts for the plan of Rule 37 (b), which makes the power to dismiss depend on whether the result is "just."

Had the dismissal in the instant case been intended as punishment, it would have been beyond the power of the court, because it would be "unjust," in the words of Rule 37 (b), or contrary to due process, in constitutional terms. *Hovey* v. *Elliott*, 167 U. S. 409; *Hammond Packing Co.* v. *Arkansas*, *supra*, at 350. But, as the courts below made clear, that was not the purpose of the dismissal (R. 2042, 623). The dismissal was grounded on an impersonal need to protect essential judicial procedures—procedures for the discovery of the decisive facts in a controversy—from frustration by foreign laws of secrecy which are inconsistent with the law of the forum. The dismissal was thus a device for enforcement of principles of law designed to produce evidence needed for disposition on the merits. A dismissal for such a purpose is just under Rule 37 (b); it is consistent with due process. By the same token, it squares with *Hammond*

Packing Co. v. *Arkansas* (*supra*), which the framers of Rule 37 properly took to permit "the justifiable use of such measures [dismissals] as a means of compelling the production of evidence." Committee Note to Rule 37, 28 U. S. C. (1952 ed.) foll. Sec. 2072.

In *Hammond*, the Court sustained a state court judgment entered under an Arkansas statute which provided for a default when a party failed to honor a valid order of production. The Hammond Company had been defaulted on its refusal to obey such an order. The excuse offered and rejected was that the order was invalid as applied to foreign corporations.

The default judgment was sustained not as punishment, but for "failure to produce the proof ordered, when such proof concerned the rightful decision of the cause." On the rejection of the claim of law offered as an excuse for failure to produce the required proof, a dismissal could be grounded, the Court said, upon a presumption that the "refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense" (p. 351). The Court likened a dismissal on this presumption to the default judgment entered "because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering" and "many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law" (*ibid*).

Petitioner argues (Brief, pp. 29–33) that *Hammond* requires that any dismissal for disobedience of an order for discovery be based upon a finding of bad faith or of a wilful refusal to comply; otherwise, it urges, there is no foundation for the presumption that the missing documents are damaging. Here, petitioner says, there was no finding of bad faith or wilfulness, and the evidence shows that the Sturzenegger records contained no damaging evidence (Brief, p. 33).

Petitioner is wrong on all counts. If *Hammond* held it necessary for a dismissal that there be a factual basis for a presumption that the missing papers would be damaging, we have such facts in this case in abundance (*supra*, pp. 45–53). *Hammond*, however, imposes no such requirement. The Court there did not find, or think it necessary to find, that the Hammond Company had acted wilfully, frivolously or in bad faith; that there was a factual showing that the missing papers were damaging; or, indeed, that the Hammond Company had done more than offer an excuse for nonproduction unacceptable in law. The "presumption" of "an admission of the want of merit" in the defense that Hammond Company offered flowed only from the unacceptability of its excuse.

The excuses ruled on in *Hammond* and in the instant case are entirely different[49] but, once each is

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[49] Petitioner seems to suggest that *Hammond* passed upon inability to comply with the order of discovery as affecting the validity of a dismissal (Brief, pp. 29–31). The Court noted that the statute and order had not, as claimed, ignored any

rejected, in each case there arises equally the presumption of want of merit on which an order of dismissal or default may be based. The rejection of the excuse leaves the party bound by the order in the position of one who has unjustifiably defaulted in the production of proof affecting "the rightful decision of the cause" (p. 351). For that reason—because the judicial process has been thwarted—the law must presume an admission of want of merit in the claim or defense of the party.

B. The power to dismiss the complaint may also be founded upon the inherent powers of the court, apart from rule or statute, to dismiss a pleading for failure to comply with procedures essential to the administration of justice. Cf. *National Union* v. *Arnold, supra,* 348 U. S. at 44. Both courts below held the dismissal to be within these powers (R. 625, 2039). Since this suit is, by the terms of Section 9 (a) of the Trading With the Enemy Act, "a suit in equity," (*infra,* p. 88), all the powers of a court of equity were available to the district court. *Kaufman* v. *Societe Internationale,* 343 U. S. 156, 161. On the failure of a party

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inability of the Hammond Company to comply and that it had been held by the state court below that a "reasonable showing of an inability to comply" would have satisfied the statute and order (p. 347). What might constitute such an inability to comply was not argued by the parties and was not in issue.

Ordinarily simple inability to produce records would be accepted as an excuse for nonproduction. Here, on the facts, the excuse was held unacceptable. *Hammond* affirms the jurisdiction of a court to pass on the validity of any excuse advanced, and does not bear on the propriety, on the facts of the instant case, of the excuse here offered.

to obey an order reasonably directed to the proper conduct of litigation, such as an order to be sworn or to testify, to proceed to trial or to produce essential documents required by law, a court of equity has power to stay the trial, and, should a stay be deemed futile to produce compliance, to dismiss.[50] "The making of an order without authority to enforce it would be a vain ceremony." Chief Judge Rugg, in *Nickerson* v. *Glines*, 220 Mass. 333, 336, 107 N. E. 942, 944.

The inherent power to dismiss a cause for failure to comply with reasonable orders has had frequent recognition. *E. g.*, *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & Elec. Co.*, 245 F. 2d 613, 628 (C. A. 8), certiorari denied, 355 U. S. 871; *Zielinski* v. *United States*, 120 F. 2d 792, 793 (C. A. 2) (affirming the inherent power of the court to dismiss notwithstanding the specific limitations of a court rule); *Boling* v. *United States*, 231 F. 2d 926, 928 (C. A. 9); *Refior* v. *Lansing Drop Forge Co.*, 124 F. 2d 440 (C. A. 6), certiorari denied, 316 U. S. 671. The power

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[50] In *Republic of Liberia* v. *Roye*, 1 App. Cas. 139, 143–144 (H. L., 1876), the Lord Chancellor, Lord Cairns, said:

> * * * the Court of Chancery has, in the first place, jurisdiction to stay all proceedings in a cause until the Plaintiff has made any discovery which he is called upon by the order of the Court to make. * * * The Court of Chancery must have of necessity the right to go farther, and to say that after a proper interval the proceedings which have been stayed shall be altogether expelled from the Court, and any property which the Court has taken possession of, be restored to the person from whom it was taken. Therefore, my Lords, upon the general and abstract question I entertain no doubt that it was within the jurisdiction of the Court of Chancery to dismiss this bill for default of proper discovery.

to enforce discovery is one of the inherent powers of the chancellor. *Kelley* v. *Boettcher*, 85 Fed. 55, 66–7 (C. A. 8); *Republic of Liberia* v. *Roye*, 1 App. Cas. 139 (H. L., 1876).[51]

These powers of a court of equity were not taken from the district court by Rule 37 (b). Rule 41 (b), dealing with involuntary dismissals, continues them in the court by its authorization of a dismissal of an action or of any claim for "failure of the plaintiff * * * to comply with these rules or *any order of court*" (emphasis added). *Boling* v. *United States*, *supra*; *Carnegie Nat. Bank* v. *City of Wolf Point*, 110 F. 2d 569 (C. A. 9); *Hicks* v. *Bekins Moving & Storage Co.*, 115 F. 2d 406 (C. A. 9).

The existence of such inherent powers finds recognition, also, in the all writs section of the Judicial Code (28 U. S. C. 1651, *infra*, p. 89). Cf. *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 675–7. That section has been held to be an independent source of power to compel production for purpose of discovery and at trial. *American Lithographic Company* v. *Werckmeister*, 221 U. S. 603 (in the face of other,

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[51] The power to enforce discovery, if regarded as flowing from the power to compel the production of evidence generally, is inherent also in courts of law, apart from statute or rule. Cf. *Kamen Soap Products Co.* v. *United States*, 124 Ct. Cls. 519, 110 F. Supp. 430.

Lord Ellenborough said, in *Amey* v. *Long*, 9 East 473, 484 (K. B., 1808), "The right to resort to means competent to compel the production of written as well as oral, testimony seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. * * *"

more limited, statutory authority); *Bethlehem Shipbuilding Corp.* v. *N. L. R. B.*, 120 F. 2d 126 (C. A. 1).

C. Lastly, the dismissal may also be grounded upon Section 17 of the Trading with the Enemy Act (*infra*, p. 89). Section 17 gives the district court, in any suit under the Trading with the Enemy Act, plenary power "to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act * * *." This jurisdiction is "specially conferr[ed] * * * independently of the statutes governing generally jurisdiction of federal courts." *Markham* v. *Allen*, 326 U. S. 490, 495.[52]

Section 17 may not add a great deal to the powers already possessed by a federal district court sitting in equity for the solution of the ordinary case. Here, however, the grant of powers in Section 17 is relevant, for it surely indicates the special concern of Congress (*cf. Markham* v. *Allen, supra*, at pp. 495–6) that want of power should not invalidate any order by a district court reasonably disposing of a problem pertaining to the discovery of the truth on issues of enemy ownership and taint in a case under the Trading With the Enemy Act.

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[52] The broad powers granted by Section 17 specifically for suits under the Trading with the Enemy Act are therefore not lessened by Rule 37 (b). Compare *Continental Bank* v. *Rock Island Ry.*, *supra*, 294 U. S. at 675–7, where the broad power to issue writs of injunction granted by Section 2 (15) of the Bankruptcy Act was held not to have been limited by another section of the Bankruptcy Act, though it dealt specifically with injunctions.

CONCLUSION

The order of dismissal was made with propriety and in the interests of the administration of justice. It was therefore within the powers of the district court, as expressed in the Federal Rules and the Trading With the Enemy Act, and as contained among the inherent powers of a court of equity. The judgment should be affirmed.[53]

Respectfully submitted,

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FEBRUARY 1958.

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[53] We note again (see p. 19, n. 10, *supra*) that the order of dismissal is in terms inapplicable to petitioner's intervening minority stockholders.

APPENDIX

Statutes and Federal Rules

Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*:

* * * * *

SECTION 5

* * * * *

(b) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as,

and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SECTION 9

(a) Any person not an enemy or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or

seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien

Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SECTION 17

The district courts of the United States are given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary".

U. S. Code, Title 28

JUDICIARY AND JUDICIAL PROCEDURE

* * * * *

PART V—PROCEDURE

* * * * *

SEC. 1651. WRITS

(a) The Supreme Court and all courts established by Act of Congress may issue all writs

necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. [As amended May 24, 1949, c. 139, § 90, 63 Stat. 102.]

Federal Rules of Civil Procedure

Rule 34.—Discovery and Production of Documents and Things for Inspection, Copying, or Photographing

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

RULE 37.—REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

(a) *Refusal To Answer.*

If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) *Failure To Comply With Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the

court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) *Expenses on Refusal to Admit.*

* * * * *

(d) *Failure of Party to Attend or Serve Answers.*

If a party or an officer of managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part therof, or enter a judgment by default against that party.

(e) *Failure to Respond to Letters Rogatory.* * * *

(f) *Expenses Against United States.* * * *

RULE 41.—DISMISSAL OF ACTIONS

(a) *Voluntary Dismissal: Effect Thereof.*

* * * * *

(b) *Involuntary Dismissal: Effect Thereof.*

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as

provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

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